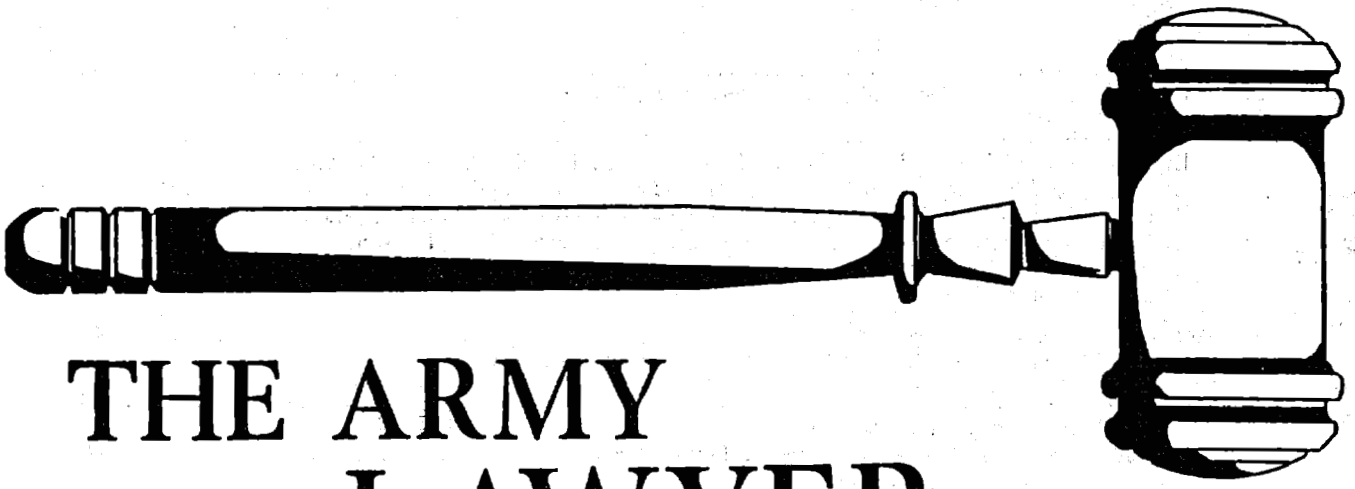

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Table of Contents

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Editor
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REPLY TO
ATTENTION OF

DAJA-ZA

21 October 1988

MEMORANDUM FOR: ALL TRIAL DEFENSE SERVICE PERSONNEL

SUBJECT: Tenth Anniversary Message

1. This year marks the tenth anniversary of the founding of the United States Army Trial Defense Service (TDS). Since 1978 TDS has developed into a dynamic, flexible, and efficient organization dedicated to providing top quality representation to service members in any forum. It has clearly achieved its goal of ensuring that soldiers and commanders understand that the Army's defense counsel are independent of command control and deserve the full confidence of their clients.

2. I extend my personal thanks and congratulations to all the attorneys and support personnel who have served and are serving in TDS. I am very proud of the contributions that the attorneys and support personnel of TDS have made to the Army.

Hugh Overholt

HUGH R. OVERHOLT
Major General, USA
The Judge Advocate General

Legality of the "Safe-Sex" Order to Soldiers Having AIDS

Major Eugene R. Milhizer
Instructor, Criminal Law Division, TJAGSA

Introduction

A cornerstone of the Army's AIDS[1] policy is the requirement for commanders to formally counsel soldiers who test positive for the HIV antibody.[2] This counselling includes an order to inform potential sexual partners of the soldier's diagnosed condition prior to engaging in intimate sexual behavior and not to engage in unprotected sexual relations.[3] The regulation provides that soldiers who willfully disobey this order may be considered for administrative or disciplinary action.[4]

The legality of such an order—the so-called "safe-sex" order—has never been directly reviewed by the military appellate courts. Thus far, several service members have been convicted by court-martial for violating the "safe sex" order, but their cases have not yet been decided on appeal.[5] In addition, commentators have generally concluded that the order is lawful.[6]

In September 1988, however, a military judge reached a contrary result in the court-martial of Private E–1 David E. Manning. The judge dismissed a disobedience charge against the accused for violating the "safe-sex" order because it had an insufficient military nexus and was overly broad.[7] The military judge's ruling was based primarily on an application of *United States v. Roach.*[8] In *Roach*, the Coast Guard Court of Military Review held that an order not to consume alcoholic beverages was an unlawful order, as it had an inadequate connection to a military duty justifying its enforcement.[9] This article will specifically address the applicability of *Roach* to the "safe-sex" order, as well as the lawfulness of the "safe-sex" order in general.

United States v. Roach

Seaman Roach, a crewmember of the USCGC Dependable, had a history of alcohol abuse and alcohol related misconduct.[10] In early 1985, he was counselled on at least three occasions for returning to his ship in an intoxicated condition.[11] He was later screened and recommended for attendance at mandatory Alcohol Anonymous meetings.[12]

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[1] AIDS is the acronym for acquired immunodeficiency syndrome. A person with AIDS has the human immunodeficiency virus (HIV), which damages the body's immune system. Each of us has innate or natural immunities. We also acquire immunities, some even before birth. A fundamental element of the immune system is the T-lymphocytes, which multiply to combat infections. T-lymphocytes are divided into two groups: T-helper cells and T-suppressor cells. T-helper cells assist mobilizing other T-lymphocytes and enhance the responsiveness of the immune system in fighting infections. T-suppressor cells become important after the infection has been fought off, as they inhibit the activity of the T-lymphocytes and terminate the immune system's response. In a person with AIDS, the HIV has infected and damaged the T-helper cells, rendering the person immunoincompetent and thus susceptible to a variety of opportunistic infections which can cause death. *See generally* Facts About AIDS, United States Public Health Service, Winter 1986 Public Information Release; Surgeon General's Report on Acquired Immune Deficiency Syndrome, United States Public Health Service, Oct. 1986.

[2] Army Reg. 600–110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 2–17a (11 Mar. 1988) [hereinafter AR 600–110]. The presence of an HIV antibody indicates that the person has been exposed to AIDS. It does not mean that the person has AIDS or will necessarily develop AIDS, nor does it mean that the person has developed an immunity to AIDS. Baruch, *AIDS in the Courts: Tort Liability for the Sexual Transmission of Acquired Immune Deficiency Syndrome*, 22 Torts & Ins. L.J. 165, 167 (1987). Many researchers now believe, however, that nearly all infected persons will have progression of illness and develop AIDS. Capofari & Wells-Petry, *The Commander's Duties in Army's AIDS Policy*, Army Magazine, Sep. 1988, at 11.

[3] AR 600–110, para. 2–17c. The sample order is stated in the following terms: "You will verbally advise all prospective sexual partners of your diagnosed condition before engaging in any sexual intercourse. You are also ordered to use condoms should you engage in sexual intercourse with a partner." *Id.*, figure 2–2. The soldier is also ordered not to donate blood, sperm, organs, or other tissues; and to notify health care workers of his diagnosed condition prior to seeking or receiving treatment. *Id.* The other services require commanders to issue similar "safe-sex" orders. *See* MEMORANDUM FOR THE AIR FORCE SURGEON GENERAL, Subject: Policy for Administering the Order to Follow Preventive Medicine Requirements to Individuals Infected With the Human Immunodeficiency Virus (HIV) and to the Use of Laboratory Test Results, dated 8 July 1988, *amending*, SAF/RS Memorandum, Policy on the Identification, Surveillance, and Administration of Personnel Infected with the Human Immunodeficiency Virus (HIV), dated 23 September 1987, enclosure at 12; *see also* SECNAV Instruction 5300.30A, Subject: Management of Human Immodeficiency Virus (HIV) Infection in the Navy and Marine Corps, dated 27 October 1987, at para. 13b(1)(a) (counselling required).

[4] AR 600–110, para. 2–17c.

[5] For example, Sergeant Richard W. Sargeant was tried by general court-martial on 27 August, 5 and 9 October, and 2 December 1987 for, *inter alia*, two specifications of disobeying the "safe-sex" order in violation of Uniform Code of Military Justice art. 90, 10 U.S.C. § 890 (Supp. IV 1986) [hereinafter UCMJ]. He was sentenced to a dishonorable discharge, confinement for nine years, total forfeitures, and reduction to Private E–1. The convening authority approved the sentence, but pursuant to a pretrial agreement, reduced the confinement to five months. This case is currently before the Army Court of Military Review. The author is aware of at least one other Army case (United States v. Negron, tried at Fort Sam Houston in early 1988) and two Air Force cases where the accused was convicted of disobedience of the "safe-sex" order. Several other courts-martial convictions have been obtained for AIDS related misconduct, including United States v. Stewart, ACMR 8702932 (A.C.M.R. 9 Sept. 1988) (unpub.) (aggravated assault where HIV was transmitted); United States v. Manning, appeal pending before A.C.M.R. (aggravated assault); United States v. Morris, appeal not yet filed with A.C.M.R. (violation of UCMJ art. 134 by engaging in unprotected sex after medical counselling); and United States v. Johnson, appeal pending before A.F.C.M.R. (aggravated assault). Interestingly, the military judge in *Morris* issued a "safe-sex" order as part of the accused's sentence in that case.

[6] *See, e.g.*, Wells-Petry, *Anatomy of an AIDS Case: Deadly Disease as an Aspect of Deadly Crime*, The Army Lawyer, Jan. 1988, at 17, 19–20.

[7] Transcript of United States v. Private E–1 David E. Manning, at 45–48.

[8] 26 M.J. 859 (C.G.C.M.R. 1988) (en banc), *certificate for review filed*, 27 M.J. ___ (C.M.A. 29 July 1988).

[9] *Id.* at 861–66.

[10] *Id.* at 860–61.

[11] *Id.* at 861.

[12] *Id.* The trial record did not indicate whether Roach attended those meetings. *Id.*

He was also placed on a supervised antabuse program.[13] In August 1985 Roach was arrested by civilian authorities in connection with his consumption of alcohol.[14] He later was absent without authority (AWOL) from 13–17 September 1985.[15] Upon his return, Roach accompanied the ship on a patrol to Key West, Florida.[16] The commanding officer (CO) administered nonjudicial punishment for Roach's AWOL offense, but then suspended the restriction portion of the punishment and allowed Roach to go on overnight liberty off the ship.[17] Before departing the vessel, the CO ordered Roach not to consume any alcohol.[18] Roach consumed alcohol during the afternoon and evening while on liberty, contrary to the CO's order.[19] He eventually returned to the ship where he set fire to a paint locker containing combustible materials.[20]

Roach was charged, in part, with disobedience of an order by a superior commissioned officer "not to consume alcoholic beverages," in violation of article 90, UCMJ.[21] He was convicted pursuant to pleas of this offense, and the findings and sentence were later approved.[22]

The Court of Coast Guard Military Review reversed, being "unable to find an adequate connection to a military duty to justify our enforcement of the order."[23] The court determined that the order did not serve any recognized military purpose,[24] but was instead issued for the paternalistic purpose of protecting the accused.[25] Moreover, the court was troubled by the commander's failure to follow established procedures for assisting personnel toward rehabilitation who have alcohol related problems.[26] Indeed, the court found that Roach's disobedience, given the circumstances, was foreseeable as the commanding officer had subjected him to an irresistible temptation to drink.[27] The court concluded that "the use of a direct order not to drink alcohol is an unjust and unreasonable mechanism to achieve the commanding officers's goals in circumstances such as these where patently legal and decidedly more effective methods were available to the commanding officer and were specifically rejected."[28]

Applying *Roach* to the Safe Sex Order

The lawfulness of virtually any order can be ascertained by examining four prerequisites: 1) the order must relate to a military duty;[29] 2) the source of the order (e.g., the issuing individual) must have authority to issue the order;[30] 3) the order must be directed specifically to a subordinate;[31] and 4) the order must be an understandable, specific mandate to do or not to do a specific act.[32] The Army's detailed and specific regulatory requirements and guidance pertaining to the "safe-sex" order[33] should all but eliminate any legal issues pertaining to the second, third, and fourth prerequisites.

As to the remaining issue—the requirement for a military nexus—the military judge in *Manning* found the "safe-sex" order legally deficient based on *Roach*. Upon close examination, however, *Roach* is distinguishable in several important respects.[34]

First, the "safe-sex" order in *Manning*, as in all such cases, was given to protect people who might become intimate with him from contracting a fatal disease. Unlike the order not to consume alcohol in *Roach*, therefore, the "safe-sex" order was clearly not issued for a purely paternalistic purpose. Quite to the contrary, the order was given to protect persons other than the recipient from harm and, indeed, death.

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[13] *Id.*

[14] *Id.* Roach assaulted a police officer during this incident. *Id.* He was subsequently advised that his misconduct violated his Alcohol Abuse Aftercare Plan, that it was considered his second "alcohol incident," and that he was not "making a sincere effort to overcome . . . [his] alcohol abuse problem." Because of all these reasons, Roach was told he was being recommended for discharge. *Id.*

[15] *Id.* Roach returned to the ship following a telephone conversation between his commanding officer and his father. *Id.* at 861–63. The CO apparently assured Roach's father that if his son returned, he would receive only a captain's mast, would not go on another patrol, and would receive an immediate psychiatric evaluation. *Id.* at 863.

[16] *Id.* at 861. The command anticipated that a message authorizing Roach's discharge would be received during the patrol. *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 860.

[22] *Id.*

[23] *Id.* at 864.

[24] *Id.* at 865 (quoting Manual for Courts-Martial, United States, 1984, Part IV, para. 14c(2)(a)(iii) [hereinafter MCM 1984]).

[25] *Roach*, 26 M.J. at 865 (quoting United States v. Wilson, 30 C.M.R. 165, 166 (C.M.A. 1961)).

[26] *Roach*, 26 M.J. at 865, referring to The Personnel Manual, COMD–TINST M1000.6.

[27] *Roach*, 26 M.J. at 865.

[28] *Id.* These methods were the procedures set forth in The Personnel Manual and not allowing Roach to go on shore. *Id.*

[29] *See generally* MCM, 1984, Part IV, para 14c(2)(iii).

[30] *See* MCM, 1984, Part IV, para. 14c(2)(a)(ii). If the order is issued by a superior commissioned officer or noncommissioned officer, the recipient must have actual knowledge of the issuer's status. *See* United States v. Oisten, 33 C.M.R. 188 (C.M.A. 1963); MCM, 1984, Part IV, para. 14c(2)(e).

[31] *See* MCM, 1984, Part IV, para. 14c(2)(b).

[32] *See id.*, Part IV, paras. 14c(2)(c) and (d). *Compare* United States v. Warren, 13 M.J. 160 (C.M.A. 1982) (order to "settle down" was not a positive command), *with* United States v. Mitchell, 20 C.M.R. 295 (C.M.A. 1955) (order to "leave out of the orderly room" was a positive command). If charged under UCMJ art. 90, willful disobedience is required for guilt. *See* MCM, 1984, Part IV, para. 14c(2)(f); United States v. Young, 40 C.M.R. 36 (C.M.A. 1969); United States v. Ferenczi, 27 C.M.R. 77 (C.M.A. 1958).

[33] *See supra* note 3.

[34] For purposes of this article, the author will assume that *Roach* was correctly decided.

Second, the commander in *Manning* did not expose the accused to an irresistible temptation to violate the order, as did the commander in *Roach*, according to the Coast Guard Court of Military Review. In fact, a virtual medical quarantine would have to be imposed in the case of HIV-positive soldiers, such as Manning, to avoid the presumed temptation to violate the commander's order. Although such drastic measures would probably ensure compliance (as would the shipboard restriction of the accused in *Roach*), they would be both overbroad[35] and contrary to regulation.[36]

Third, while the order in *Roach* created an absolute prohibition against engaging in certain activity, the more limited order in *Manning* merely imposed reasonable conditions upon an activity. Issues concerning the limited scope of orders which intrude upon personal and private matters will be discussed in greater detail in the following section.[37]

Finally, the "safe-sex" order in *Manning* was issued pursuant to a regulatory requirement. Thus, the order was not, as in *Roach*, a commander's *ad hoc* method for addressing a problem which was contrary to a service policy.

Of course, the latter basis for distinguishing *Roach* begs the question of whether the Army's regulatory requirement to give the "safe-sex" order is itself lawful. Although certainly subject to debate, the better argument is that the order has a sufficient military nexus without being unnecessarily intrusive and is, therefore, lawful. This argument will be developed next.

Military Nexus of the "Safe Sex" Order

The Manual for Courts-Martial defines the relationship of an order to military duty in the following terms:

> (iii) *Relationship to military duty.* The order must relate to military duty, which includes all activities reasonably necessary to accomplish a military mission, or safeguard or promote the morale, discipline, and usefulness of members of a command and directly connected with the maintenance of good order in the service. The order may not, without such a valid military purpose, interfere with private rights or personal affairs. However, the dictates of a person's conscience, religion, or personal philosophy cannot justify or excuse the disobedience of an otherwise lawful order. Disobedience of an order which has for its sole object the attainment of some private end, or which is given the sole purpose of increasing the penalty for an offense which it is expected the accused may commit, is not punishable under this article.[38]

Applying the Manual standard, the "safe-sex" order has a clear military nexus, at least where the soldier's potential sexual partners are other service members. Indeed, few activities could conceivably have as detrimental an impact on mission accomplishment, morale, good order, and discipline as would the spread of AIDS within a military organization.[39] The likely adverse impact on morale would remain nearly as great, even where the disease was not transmitted, when the uninformed and unprotected sexual partners later learn of the soldier's diagnosed condition.

A comparably strong military nexus is found where the victims are civilians, provided they are family members of a soldier or Department of Defense (DOD) civilian employees. The adverse impact upon morale, good order, and discipline would be predictable and significant. Moreover, the governmental interest of avoiding the spread of AIDS to health-care beneficiaries and civilian workers is both obvious and reasonable.

The toughest case for showing a sufficient military nexus involves victims who are civilians not directly tied to the military—so-called "unaffiliated" civilians. One argument in support of finding an adequate military nexus is that any transmission of the disease, including to "unaffiliated" civilians, increases the chances of further transmission among soldiers, their family members, and DOD employees. In essence, this argument says that because an "unaffiliated" civilian can act as a conduit for the spread of the disease among soldiers or other "affiliated" people, a sufficient military nexus exists to require soldiers to warn these people and to use condoms before engaging in sexual relations with them.[40]

This argument says too much. Any projected transmission back to the post via a civilian is certainly hypothetical and, at best, attenuated. Serious issues as to causation generally, and intervening cause in particular, could also be raised.[41] Such a broad theory of liability would also expand the concept of military duty to include a whole range of activities generally thought to be outside the scope of its limits.

The better argument in support of finding an adequate military nexus where "unaffiliated" civilians are involved is far more direct. This argument provides that a soldier's conduct in engaging in unwarned and unprotected sex in

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[35] *See* Wells-Petry, *supra* note 6 at 19. *But cf.* Judd v. Packard, 669 F.Supp. 741 (D. Md. 1987) (inmate not denied any constitutional rights due to his placement in state prison hospital isolation unit while being tested for AIDS); Powell v. Oklahoma, 647 F.Supp. 968 (N.D. Okla. 1987) (prison officials justified in segregating prisoner who tested positive for HIV).

[36] *See* Army Reg. 600–20, Army Command Policy, para. 5–4b(3) and (4) (11 Mar. 1988). Additionally, the restriction in *Roach* was imposed as punishment for earlier misconduct. No similar basis for restriction is available merely because a soldier tests positive for the HIV antibody.

[37] *See infra* notes 64–65 and accompanying text.

[38] MCM, 1984, Part IV, para 14c(2)(a)(iii).

[39] *See* Wells-Petry, *supra* note 6, at 19–20. In this regard, an order based on health concerns within a military community has been upheld against a claim that it contravened personal religious convictions. United States v. Chadwell, 36 C.M.R. 741 (N.B.R. 1965) (refusal to obey order to receive inoculations); *see generally* United States v. Wheeler, 30 C.M.R. 387 (C.M.A. 1961).

[40] *Cf.* United States v. Trottier, 9 M.J. 337, 349–50 (C.M.A. 1980) (off-post drug commerce is service connected because of its potential detrimental effect on the installation).

[41] The defense of intervening cause has three elements: (1) the injury or death resulted from an independent, intervening cause; (2) the accused did not participate in the intervening cause; and (3) the intervening cause was not foreseeable. *See generally* Dep't of Army, Pam 27–9, Military Judges' Benchbook, paras. 3–88, 3–154, and 5–4 n.2. Accordingly, an issue as to foreseeability of further transmission may be raised in connection with this asserted basis for establishing a military nexus. *See generally* United States v. Varraso, 21 M.J. 129 (C.M.A. 1985); United States v. Gomez, 15 M.J. 594 (A.C.M.R. 1983).

the civilian community, after having been advised of the consequences, is so extremely service discrediting that it can serve as the proper basis for a preventive order. The courts and boards have found, for example, that intentionally failing to pay a civilian a just debt[42] and public drunkenness[43] constitute service discrediting conduct. With regard to sexually related activities, public cohabitation in the civilian community[44] and cross-dressing[45] have likewise been determined to be service discrediting.[46] Given these precedents, the conclusion is apparent that knowingly exposing civilians to a fatal disease by failing to take reasonable precautions is likewise service discrediting and may, therefore, establish the requisite military nexus for a lawful order.[47]

Even if the "safe-sex" order is determined to be overbroad as applied to certain civilians, this would not cause the order to be unenforceable in cases where a clear military nexus is established, i.e., soldier-to-soldier contact.[48] Certainly a soldier could not complain that he lacked fair notice regarding the legality of his conduct,[49] as the various counselling sessions and the commanding officer's order would provide such notice. Similarly, even if the "safe-sex" order intrudes impermissibly upon constitutionally protected areas in some cases, this would not invalidate the order when applied in circumstances clearly lacking in those protections.[50]

That the "safe-sex" order might interfere with private rights or personal affairs would not render it unlawful, provided that a "valid military purpose" supports the order.[51] For example, the order to remove a bracelet[52] and a regulation prohibiting loans between subordinates and superiors[53] have been upheld as lawful even though they concern private rights or personal affairs.

More directly to the point, certain sexual activities on the part of soldiers can be regulated or even prohibited outright. Under some circumstances, consensual heterosexual sodomy[54] and consensual indecent acts,[55] for example, are prohibited under military law. Fraternization[56] and sexual relations between cadre members and trainees[57] are likewise prohibited. Military law also proscribes adultery;[58] and fornication, if not strictly private, is also deemed to be criminal.[59] Sexual acts with a human corpse[60] and a chicken[61] are likewise offenses under military law. Even

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[42] United States v. Kirksey, 20 C.M.R. 272 (C.M.A. 1955).

[43] United States v. McMurtry, 1 C.M.R. 715 (A.F.B.R. 1951).

[44] United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

[45] United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[46] The gravamen of a clause 2, article 134 violation is the resulting impact of the accused's conduct upon the armed forces. Although the accused's misconduct must, therefore, be knowing and not negligent, a specific intent to bring the service into discredit is not required. United States v. Armstrong, 11 M.J. 740, 741 (A.C.M.R. 1981).

[47] *See generally* United States v. Milldebrandt, 25 C.M.R. 139, 142 (C.M.A. 1958). Assuming the underlying conduct is service discrediting, it could serve as a basis for a violation of UCMJ art. 134 clause 2. *See* MCM, 1984, Part IV, para. 60c(3). If this is true, an argument could be made that an order not to engage in "unsafe sex"—in other words, an order to obey the law—is unenforceable, either because of the ultimate offenses doctrine, United States v. Landwehr, 18 M.J. 355 (C.M.A. 1984), or because the order lacks content (i.e., is merely an order to obey the law). *See* United States v. Bratcher, 39 C.M.R. 125 (C.M.A. 1969); United States v. Beattie, 17 M.J. 537 (A.C.M.R. 1983). The ultimate offense doctrine would not apply, however, as the order would be given to obtain compliance rather than to enhance punishment. *See Landwehr*, 18 M.J. 355 (C.M.A. 1984); United States v. Petterson, 17 M.J. 69 (C.M.A. 1983). As to the issue of content of the order, separately charging disobedience should, in fairness, be allowed at least until the appellate courts decide whether "unsafe sex" by an HIV-positive soldier violates the law as a distinct, substantive offense under another theory, such as assault. *Compare* United States v. Stewart, ACMR 8702932 (A.C.M.R. 9 September 1988) (unpub.) (aggravated assault conviction affirmed where the disease is transmitted), *with* United States v. Morris, appeal not yet filed with A.C.M.R. (military judge dismissed the assault charge because no evidence of transmission of the disease was shown). *See generally* Wells-Petry, *supra* note 6, at 20–26, for a discussion of other offenses which may be violated by AIDS related misconduct.

[48] *See generally* Parker v. Levy, 417 U.S. 733, 752–57 (1974).

[49] *See id.; see also* United States v. Johanns, 20 M.J. 155 (C.M.A. 1985); United States v. Kick, 7 M.J. 82 (C.M.A. 1979); United States v. Lowery, 21 M.J. 998, 1000 n.2 (A.C.M.R. 1986) (even absent codification in the 1984 Manual, the accused was on notice that his sexual conduct with enlisted soldiers constituted a crime), *aff'd*, 24 M.J. 347 (C.M.A. 1987) (summary disposition).

[50] For example, an attempt to extend the "safe-sex" order to the marital relationship may intrude impermissibly upon constitutionally protected areas. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); *see also* United States v. Scoby, 5 M.J. 160, 165–66 (C.M.A. 1978). *But see* Doe v. Coughlin, 71 N.Y.2d 48, 518 N.E.2d 536, 523 N.Y.2d. 782 (N.Y. App. 1987) (some heterosexual marital contacts might be constitutionally limited to avoid transmission of AIDS); Doe v. Commissioner, 509 N.Y.S.2d 209, 125 A.D.2d 783, 55 U.S.L.W. 2400 (1986) (policy of not allowing an inmate with AIDS to have conjugal visits with wife was rational and enforceable given the risk of transmission and the dire consequences attendant to disease control and operational exigencies). Such a limitation, however, would not render the "safe-sex" order unenforceable when applied to other relationships. *See* Bowers v. Hardwick, 92 L.Ed.2d 140 146–47 (1986) (state may prohibit consensual sodomy among homosexuals as the marital relationship or other protected interests or rights are not involved); *see also Scoby*, 5 M.J. at 165–66. The "safe-sex" order required by the Army regulation does not extend to the marital relationship. AR 600–110, para. 2–17c.

[51] MCM, 1984, Part IV, para 14c(2)(a)(iii); *see Chadwell*, 36 C.M.R. 741 (N.B.R. 1965).

[52] United States v. Wartsbaugh, 45 C.M.R. 309 (C.M.A. 1970): *see also* Goldman v. Weinberger, 106 S. Ct. 1310 (1986).

[53] United States v. McClain, 10 M.J. 271 (C.M.A. 1981).

[54] UCMJ art. 125; *see* United States v. Scoby, 5 M.J. 160 (C.M.A. 1978). Indeed, the Supreme Court has expressly determined that homosexual sodomy is not a constitutionally protected activity. Bowers v. Hardwick, 92 L.Ed.2d 140 (1986).

[55] United States v. Woodard, 23 M.J. 514 (A.F.C.M.R. 1986), *set aside on other grounds*, 24 M.J. 514 (A.F.C.M.R. 1987).

[56] United States v. Moultak, 24 M.J. 316 (C.M.A. 1987).

[57] United States v. Lowery, 21 M.J. 998 (A.C.M.R. 1986), *aff'd*, 24 M.J. 347 (C.M.A. 1987) (summary disposition); United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985).

[58] United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Maxwell, 12 M.J. 229 (C.M.A. 1986).

[59] *Hickson*, 22 M.J. at 150.

[60] United States v. Mabie, 24 M.J. 711 (A.C.M.R. 1987).

[61] United States v. Sanchez, 29 C.M.R. 32 (C.M.A. 1960).

cohabitation in the civilian community[62] and cross-dressing[63] can be punished under the UCMJ.

When the command intrudes upon the sexual activities of a soldier, however, the intrusion should be as limited as possible while serving the military purpose. This is simply another way of stating the requirement that orders serve a military purpose,[64] as the unnecessarily broad and intrusive aspects of an order would lack a sufficient military nexus.

Tested against this standard, the required "safe-sex" order is as limited as possible while fully achieving its military purpose. Soldiers are not quarantined, nor are they prohibited from engaging in sexual intercourse.[65] They are instead simply required to ensure that potential sexual partners are protected and informed. Merely because the number of willing partners may be diminished does not mean that the order is unnecessarily intrusive. The prohibition against adultery, carnal knowledge, and fraternization, for example, reduce the pool of potential sexual partners without being overbroad or otherwise unenforceable.

Finally, the "safe-sex" order comports with the recommendations of the President's Commission on the HIV Epidemic. The commission recommended, in part:

> Adoption by the states of a criminal statute—directed to those HIV-infected individuals who know of their status and engage in behaviors which they know are, according to scientific research, likely to result in transmission of HIV—clearly setting forth those specific behaviors subject to criminal sanctions. With regard to sexual transmission, the statute should impose on HIV-infected individuals who know of their status specific affirmative duties to disclose their condition to sexual partners, to obtain their partner's knowing consent, and to use precautions, punishing only for failure to comply with these affirmative duties.[66]

In summary, the "safe-sex" order has an obvious military nexus when the soldier's potential sexual partner is a service member, family member, or civilian employee. An arguable nexus is present even for "unaffiliated" civilians, given the severely service discrediting impact of unwarned and unprotected sex in the civilian community under such circumstances. Even if the order lacks a sufficient military nexus in some cases, it is sufficiently definite and related to a military purpose to support its lawfulness in most circumstances. Because the order is narrowly drawn to achieve its military purpose without unnecessarily intruding into private areas of conduct, it is not rendered unlawful because it modifies sexual behavior. The "safe-sex" order, in short, is a lawful military order.

Conclusion

As recent events demonstrate, the legality of the "safe-sex" order is not settled. Persuasive arguments against the lawfulness of the order can surely be made in certain cases. More sweeping arguments against the legality of all such "safe-sex" orders will no doubt also be advanced. Despite all of these contentions, the "safe-sex" order would constitute a lawful military order in most circumstances. Until the appellate courts authoritatively decide this issue, however, the legality of the "safe-sex" order will surely remain a subject of academic controversy and adversarial contention.

Editor's note—*As this article went to print, the Air Force Court of Military Review decided the case of* United States v. Womack, *ACM 26660 (A.F.C.M.R. 27 Oct. 1988) (en banc). In* Womack, *the court affirmed the accused's conviction for violating a "safe-sex" order from his commander by engaging in unwarned and unprotected homosexual sodomy.*

[62] United States v. Leach, 22 C.M.R. 178 (C.M.A. 1956).

[63] United States v. Davis, 26 M.J. 445 (C.M.A. 1988).

[64] MCM, 1984, Part IV, para. 14c(2)(a)(iii).

[65] Compare the limited "safe-sex" order in *Manning* to the absolute prohibition against drinking alcohol in *Roach*.

[66] Report of the President's Commission on the Human Immunodeficiency Virus Epidemic, 24 June 1988, at 9–46. Consistent with these recommendations:

> In 1987 alone, 29 bills containing criminal sanctions specifically dealing with AIDS were introduced in state legislatures. Five states have enacted statutes which criminalize certain behavior by individuals who have tested positive for Human Immunodeficiency Virus (HIV), the Virus which causes AIDS—as well as those who have AIDS or AIDS-Related Complex (ARC).

M. Schechter, *AIDS: How the Disease Is Being Criminalized*, American Bar Association Criminal Justice, Section of Criminal Justice 6, 7 (Fall 1988, vol. 3, no. 3) (citing Draft Report of the American Bar Association Section of Criminal Justice Ad Hoc Committee on AIDS and the Criminal Justice System, March 1988, p. 59).

Common Sense and Article 9: A Uniform Approach to Automobile Repossessions

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Introduction

At best, automobile repossession cases are vexing irritants for legal assistance attorneys. They are particularly frustrating given the circumstances in which they typically arise. Often, the clients are facing extreme financial difficulties. Although the clients may have suspected that repossession was likely for quite some time, they may nevertheless have delayed seeking an attorney's assistance in hopes that the inevitable would never occur. They may

even have delayed seeking legal help until after the repossession. The longer the clients wait before seeking assistance, the more they limit their options and the attorney's ability to obtain relief.

Clients who seek legal assistance earlier in the repossession process preserve their options, which may include preventing the repossession altogether, allowing the client an opportunity to reclaim the vehicle after repossession, or limiting the client's liability to the loss of the vehicle itself. Many of the actions considered by the attorney will be based on the provisions in Article 9 of the Uniform Commercial Code (U.C.C. or the Code).[1] This article begins with a discussion of steps that may be taken to eliminate the need to resort to the U.C.C. Because these steps will not always be successful, the article also examines the protective provisions of the U.C.C. and how they have been interpreted and applied by various courts.[2]

Preventing Repossession

The most typical causes of automobile repossession are debtor ignorance and procrastination. When debtors fail to seek legal assistance because they are unaware of their rights with respect to secured transactions or because they believe that nothing can be done to prevent the repossession, the attorney will indeed be able to do little following the repossession. Hence, the attorney's first step in preventing repossession is to educate potential clients so they will seek help.[3]

If the legal education campaign has been effective, the attorneys should see their clients well before repossession occurs. At the initial meeting, the attorneys should gather the information necessary to formulate their strategy, determine how many months the clients are behind in their payments, and consider what actions the creditors have already taken. It is also important to obtain copies of purchase and finance contracts, payment booklets, checking and savings account statements, leave and earnings statements, and summaries of the clients' monthly expenses. The attorney should inquire into the clients' payment histories and determine whether the creditors have previously threatened repossession. If time permits, attorneys should obtain their clients' credit reports.[4]

Attorneys must also direct some attention to the vehicles. They should determine the mechanical condition of the cars, as well as the retail and wholesale values of the cars. The clients should be encouraged to keep the cars clean and mechanically sound, if possible, to protect the resale values in case the clients are forced to sell the cars.

All of this information is essential in determining strategy and predicting the likelihood of success. For example, the prospect of obtaining alternative financing may be discounted if the clients have grossly abused their previous credit privileges. Conversely, if the attorney determines that the delinquency is due merely to a temporary cashflow problem, it may be prudent to dedicate substantial time to negotiating with the creditors. Because time is always of the essence, it is important that the attorneys become completely familiar with the circumstances before devoting their attention to one approach or the other.

The first, often overlooked, approach is simply contacting the creditor and requesting an extension. To be successful, attorneys must satisfy the creditors that their clients are credit-worthy and can cure the delinquency within a reasonable period. Otherwise responsible payment histories and good credit ratings will assist in both respects. Extensions, which are inexpensive and painless, should never be overlooked.

Often, obtaining an extension is simply a matter of showing the creditor that an extension is in the creditor's best interest. Perhaps the delinquency is due to an unexpected, nonrecurring expense. In this case, it would be foolish for the creditor to repossess the car and further jeopardize their ability to collect on the loan. If, however, the client's delinquency is the result of a long term overextension of finances, it is unlikely that the client's financial situation will improve within a short period of time. Under these circumstances, the attorney might assist the client in developing a written plan that shows how the client proposes to cure the delinquency. A written proposal is often more effective than verbal assurances, because it shows that the client has given serious consideration to the problem. Even a plan that stretches over six months or more may provide the creditor with a greater return than if the creditor repossessed and resold the car. Upon resale, the creditor may not receive the full amount of the outstanding debt, and it will be difficult to collect the deficiency because of the client's poor financial situation. Thus, an extension may be in the creditor's best interest even though the client's financial position seems hopeless.

A second, less desirable option involves assisting the client in refinancing through the original or another creditor with the goal of achieving lower payments. The attorney's role in this process is essentially an advisory one. The attorney should discourage the client from using an easily obtainable, high interest loan; such loans invariably worsen the client's financial situation. Even the more competitive loans should be avoided, if possible, as they often increase the client's long term debt by combining lower periodic payments with higher interest rates or longer loan terms. Even under these circumstances, however, refinancing may be preferable to repossession, and should be considered.

A final approach involves selling the car to a third party and obtaining a release from the creditor. Here, too, the attorney's participation will be limited. Although the attorney may give the client a few practical tips to increase the probability of selling the car, the attorney's main concern will be ensuring that the creditor gives the client a written release and not just an acquiescence in a third party's assumption of the debt. The attorney may even draft a release for the creditor's signature. Of course, without evidence of the release, selling the car may be no solution at all. Although

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[1] Uniform Commercial Code (9th ed. 1978) [hereinafter U.C.C.]. The U.C.C. has been adopted in all states except Louisiana. J. White and R. Summers, Uniform Commercial Code 1 (2d ed. 1980).

[2] Rather than concentrate on a single jurisdiction, this article will delineate general rules. Specific cases are discussed in order to identify and exemplify trends.

[3] On most military installations there are media available for this purpose. The newspaper, daily bulletins, and information papers are excellent resources.

[4] *See* 15 U.S.C. § 1681g (1982).

selling the car and obtaining the release may seem simple enough, this approach can create additional problems, because a client who sells his only vehicle must find transportation. Obviously, collateral consequences such as this must be considered when adopting a given course of action.

Post-Repossession

Sometimes, despite the attorney's best efforts or because of client procrastination or ignorance, the creditor will repossess the client's car. It may then appear that the damage is complete and there is no remaining need for an attorney. On the contrary, it is at this point that the client most needs legal counsel. The U.C.C. contemplates as much:

> In the area of rights after default, our legal system has traditionally looked with suspicion on agreements designed to cut down the debtor's rights and free the secured party of his duties. . . . The default situation offers great scope for overreaching; the suspicious attitude of the courts has been grounded in common sense.[5]

Because the client is very vulnerable after repossession, the attorney's efforts on the client's behalf are critical at this stage. The attorney must alert the client that the bank may sell the automobile for whatever price is easily obtained, and that this price may not be sufficient to extinguish the client's debt.[6] If this occurs, the bank may attempt to obtain a judgment against the client for the deficiency.[7] Once the judgment is granted, the client will have little recourse, having already lost the car and whatever equity may have accrued. The client's credit rating will have been damaged, and there will be an outstanding judgment against him.

The attorney's active participation in a post-repossession case can prevent the above scenario from occurring. Article 9 of the U.C.C. may provide the attorney not only with the tools, but with the remedies as well. It establishes procedural protections designed to ensure that the debtor is treated fairly and is not saddled with an unjust deficiency judgment. The courts have also fashioned a forfeiture penalty to be used in case the creditor fails in its obligation to treat the client fairly. Skillful use of both the procedural protections and the available remedy may protect the client from further damage.

Two important protections established by the Code are the right to receive notice prior to sale of the collateral and the requirement that any sale of the collateral be conducted in a commercially reasonable manner.[8] It is important that these protections be enforced. Insisting on strict compliance will either ensure that the collateral is not sold for a grossly inadequate price or, as discussed later, prevent the creditor from asserting a large deficiency judgment against the debtor. The rights to receive notice prior to sale and to a commercially reasonable sale of the collateral are established in § 9–504(a):

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place, and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.[9]

Note that § 9–504(3) establishes two exceptions to the debtor's right to receive notice prior to sale or other disposition. The first is of no concern in automobile possession cases because an automobile is not perishable and does not speedily decline in value. The second exception, which applies only when there is a recognized market for the collateral, is equally inapplicable given the case law. It is settled that there exists no "recognized market" for used automobiles.[10] Generally, a recognized market is one in which the price of goods does not depend on individual differences and is essentially nonnegotiable.[11] In contrast, the price of a used car will depend on several factors, including "make, style, horsepower, age, and condition."[12] Thus, neither of the exceptions to the notice requirement apply in automobile repossession cases.

The requirement that notice be reasonable has provided the impetus for much litigation. The dispute most often arises when the debtor has not actually received notice, although the creditors may have made some attempt at actual notification. The Code does not define "reasonable" notification, although the comments to § 9–504 provide some insight:

> "Reasonable notification" is not defined in this Article; at a minimum it must be sent in such time that persons entitled to receive it will have sufficient time to take

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[5] U.C.C. § 9–501 (Comment 4) (9th ed. 1978).

[6] One study indicates that the average resale price of repossessed cars is only 52% of the retail value. *See* J. White and R. Summers, *supra* note 1, at 26–9.

[7] The creditor has the right to apply the proceeds of sale to the following:
(a) The reasonable expenses of retaking, holding, preparing for sale or lease, selling, leasing and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorney's fees and legal expenses incurred by the secured party;
(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;
(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefore is received before distribution of the proceeds is completed.
U.C.C. § 9–504(1) (1978). The debtor is liable for any deficiency. U.C.C. § 9–504 (1978).

[8] U.C.C. § 9–504(3) (1978).

[9] *Id.*

[10] *See* J. White and R. Summers, *supra* note 1, at 26–10.

[11] *Id.*

[12] Nelson v. Monarch, 452 S.W.2d 375, 377 (Ky. Ct. App. 1970).

appropriate steps to protect their interests by taking part in the sale or other disposition if they so desire.[13]

Significantly, there is no provision guaranteeing that the debtor actually receive notice. The Code simply requires that notice be "sent." "Sending" notification requires only that the creditor dispatch the notice in a manner that reasonably ensures receipt, such as depositing a properly stamped and addressed letter in the mail.[14]

There are, nevertheless, circumstances under which a court sympathetic to the debtor may view the failure of actual receipt as important. In *Mallicoat v. Volunteer Finance & Loan Corp.*,[15] the creditor repossessed an automobile and sent notice by registered mail of its intent to sell the vehicle. When the letter was returned unclaimed, the creditor proceeded to sell the vehicle and obtain a deficiency judgment against the debtor.[16] On appeal, the court held that the creditor had not given reasonable notice, finding that the creditor should have made a further attempt to ensure actual receipt of notice, as the debtor and creditor were in the same city, the creditor knew where the debtor and his parents lived, and the creditor knew that the debtor had not actually received the letter of notification.[17]

Other courts have acknowledged that actual receipt is irrelevant under the Code, and then gone to great lengths to find insufficient notice. In *Central Bank & Trust Co. v. Metcalfe*,[18] a Kentucky case, the creditor sent notice to codebtors who were husband and wife. Although the financing contract was signed individually by both husband and wife, the creditor sent the single repossession notice to "Mr. and Mrs. Herbert H. Metcalfe." The Court held that this notice was insufficient as to the wife, finding that notice to one spouse is not automatically imputed to the other.[19] Thus, while the Code requires that the creditor do very little to meet the notice requirement, some courts have held the creditor to a stricter burden.

An attorney who is successful in ensuring notice prior to sale of the collateral will be in a much better position to influence the price at which the collateral sells. One method of ensuring notice is for the attorney to contact the creditor immediately after the first client interview, inform the creditor of the attorney's representation, and request that all notices and documents be sent directly to the attorney.

Once notice is given, the attorney will be able to monitor the method of sale to ensure that the collateral brings a fair price. If, for example, the creditor plans to sell the collateral at a public auction, the attorney may wish to inquire into the methods of advertising and be present at the auction. If the attorney finds the planned method of sale insufficient, the attorney should be certain to register an objection. These objections should be made even if the sale could be considered commercially reasonable under U.C.C. standards. Often, the creditor will heed those objections in order to avoid future litigation.

The second important protection provided by § 9–504(3) is the requirement that the creditor sell or dispose of the collateral in a "commercially reasonable" manner. Here again, the Code provides little guidance:

> If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner.[20]

Better guidance with respect to what type of sale will be considered commercially reasonable is usually provided by the courts. One court, however, has defined a commercially reasonable sale as one that is in accordance with "prevailing trade practices among reputable business and commercial enterprises engaged in the same or similar business."[21] Given the vagueness of the terms used, this definition is only moderately helpful, at best. Other courts have provided more definitive guidance.

In *Trimbol v. Sanitol of Memphis, Inc.*,[22] the court gave a short but helpful discussion of commercial reasonableness. The opinion highlighted six factors that should be considered in determining whether a sale is commercially reasonable: the type of collateral involved, the condition of the collateral, the number of bids solicited, the time and place of sale, the purchase price or terms of sale, and any special circumstances.[23]

The attorney should use the *Trimbol* factors in analyzing a particular fact situation. The first two factors, type and condition of the vehicle, focus on the price at which a reasonable sales representative would expect to sell the collateral. If the attorney's analysis shows that the car is a rusty, old, foreign import that needs repair, the price expectation should be low. The third and fourth factors, time and

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[13] U.C.C. § 9–504 (Comment 5) (1978).

[14] U.C.C. § 1–201 (38) (1978).

[15] 415 S.W.2d 347 (Tenn. Ct. App. 1966).

[16] *Id.* at 349.

[17] *Id.* at 350. Later Tennessee opinions have relied on *Mallicoat* to take a functional approach to the notice requirement, focusing their inquiry on whether the creditor's actions have actually informed the debtor of the impending disposition. For example, in International Harvester Credit v. Ingram, the court stated:

> We think the provision for notice in connection with a sale is intended to afford the debtor a reasonable opportunity (1) to avoid a sale altogether by discharging the debt and redeeming the collateral or (2) in case of sale, to see that the collateral brings a fair price. A notice that does not afford him this reasonable opportunity is not reasonable notification and a sale under it is not commercially reasonable.

619 S.W.2d 134 (Tenn. Ct. App. 1981) (citing Mallicoat v. Volunteer Finance and Loan Corp., 57 Tenn. App. 106, 415 S.W.2d 347 (1966)).

[18] 663 S.W.2d 957 (Ky. Ct. App. 1984).

[19] *Id.*

[20] U.C.C. § 9–507(2) (1978).

[21] *See, e.g.*, Mallicoat v. Volunteer Finance & Loan Corp., 415 S.W.2d 347, 350 (Tenn. Ct. App. 1966).

[22] 723 S.W.2d 633 (Tenn. Ct. App. 1986).

[23] *Id.* at 642 (citing *In re* Four Star Music Co., 2 B.R. 454 (M.D. Tenn. 1979)).

place of sale and number of bids solicited, focus on the efforts put into the sale based on the price expectations determined by the first two factors. If the automobile was an extremely popular model with low mileage, it would be unreasonable for the creditor to sell the automobile to the first bidder, without negotiation. The sixth factor, referred to as "special circumstances" by the *Trimbol* court, is simply a catch-all phrase for any other relevant equitable circumstances. For example, in *Trimbol*, the defaulting debtor contacted potential purchasers and suggested that the collateral would be entangled in lawsuits, thereby discouraging those purchasers.[24] Thus, the *Trimbol* factors provide for a pragmatic approach to the issue of commercial reasonableness.

The price factor listed in *Trimbol* is really not a factor at all. Instead, it is the goal toward which all other factors are geared.[25] Despite the Code drafter's intentions to the contrary,[26] the price for which the collateral sells is the overriding consideration. Indeed, the issue of commercial reasonableness will never arise unless the collateral sells for an unsatisfactory price. Therefore, an insufficient price should not be a factor in determining commercial reasonableness. Instead, the debtor's attorney should treat a low price as the basis for a presumption of commercial unreasonableness.

This approach is justified by case law. While the courts may *state* that price is not everything, they invariably *treat* price as though it were the determining factor. In *Womack v. First State Bank*,[27] the court stated: "While a low price is not conclusive proof that a sale has not been commercially reasonable, a large discrepancy between sales price and fair market value 'signals a need for close scrutiny.' "[28] In another case, *Smith v. Daniels*,[29] the court stated: "Although the Code is careful to point out that a creditor's failure does not in and of itself make a sale commercially unreasonable, a sufficient resale price is the logical focus of the protection given debtors by these sections."[30] It seems obvious, then, that a low resale price gives the attorney a basis upon which to make a good faith argument that the sale was commercially unreasonable.

Two points of reference to be used in arguing that the sale price was commercially unreasonable are the fair market value of the vehicle and the market chosen by the creditor (wholesale or retail). The fair market value of an automobile can easily be determined by reference to the Red Book.[31] Although the Red Book value is not the sole standard by which to analyze a resale, "even when such handbooks are only considered a guide to valuation they will provide the attorney with a rough standard by which to measure the sufficiency of the price received."[32]

Most handbooks will list both the wholesale and retail value of the automobile. The retail value will always be higher than the wholesale value. It is therefore necessary to determine which market is considered commercially reasonable. The debtor's attorney, of course, should argue that a sale in a wholesale market is commercially unreasonable. Unfortunately, this argument has not been very successful in recent times. In *Hall v. Owen State Bank*,[33] for example, the court stated:

> It is certainly true that a retail sale of goods will in most cases command a much higher price. However, a retail sale will usually generate considerably more expense, such as reconditioning expenses, advertising expenses and sale commissions, insurance costs, etc., and usually will take much longer to consummate. This in turn may result in higher storage expenses and a higher interest accrual under the original obligation. Therefore, a sale to a dealer on the wholesale market will probably be the more reasonable approach in most cases.[34]

If the facts are such that a retail sale will generate more expense, *Hall* should allow creditors to use the wholesale market. In most automobile repossession cases, however, these expenses will not be present. This is especially true if the creditor is a bank, in which case the attorney should insist that some attempt be made to sell the vehicle on the retail market. This would only require that the vehicle be parked in the bank parking lot with a "For Sale" sign. It would not require reconditioning, advertising, commissions, or storage expense. Hence, *Hall* does not automatically preclude sale in the retail market.

Section 9–507 establishes the debtor's remedy where the creditor violates the protections outlined in Article 9. It provides for damages and establishes a minimal amount of recovery.[35] This remedy will normally not be very advantageous, as the debtor's obligation on the original loan will probably exceed provable damages. The more effective remedy in response to a creditor's violation of the U.C.C. is the forfeiture of the deficiency judgment. This "remedy" for the debtor also acts as a penalty against the creditor. It is also more effective in creating an incentive for creditors to provide the Code protections.

Not all jurisdictions recognize the forfeiture penalty. Some hold that the creditor's failure merely creates a rebuttable presumption that the collateral would have garnished

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[24] *Id.* at 640.

[25] *See* J. White and R. Summers, *supra* note 1, at 26–11.

[26] "The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." U.C.C. § 9–507(2).

[27] 728 S.W.2d 194 (Ark. Ct. App. 1987).

[28] *Id.* at 197.

[29] 634 S.W.2d 276 (Tenn. Ct. App. 1982).

[30] *Id.* at 278.

[31] National Market Reports, Inc., Red Book (January 1988).

[32] J. White and R. Summers, *supra* note 1, at 26–11.

[33] 370 N.E.2d 918 (Ind. Ct. App. 1977).

[34] *Id.* at 930.

[35] "If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus ten percent of the principal amount of the debt or the time price differential plus ten percent of the cash price." U.C.C. § 9–507(1).

an amount equal to the debt had the creditor followed U.C.C. procedures.[36] In those jurisdictions, the creditor has the burden of proving that the collateral's resale price was unaffected by the failure to follow U.C.C. procedure. Once this is accomplished, the creditor is entitled to a deficiency judgment.

The movement to accept the "forfeiture penalty" concept as the majority rule is best illustrated by a series of cases decided by the Arkansas Supreme Court. The first, *Norton v. National Bank of Commerce*,[37] involved the typical situation. The bank repossessed an automobile and, without notice to the debtor, sold it at a private sale.[38] The proceeds were insufficient to cover the debt and the bank therefore sued for a deficiency judgment.[39] The debtor argued that the bank's failure to give notice barred it from collecting a deficiency judgment.[40] The court agreed that the bank had acted improperly but nevertheless refused to accept the debtor's argument. Instead, the court established a compromise:

> We think the just solution is to indulge the presumption in the first instance that the collateral was worth at least the amount of the debt, thereby shifting to the creditor the burden of proving the amount that should reasonably have been obtained through a sale conducted according to law.[41]

The rule in *Norton* seems fair to both the debtor and creditor. The court's approach cautiously accepted the Code drafters' notion that creditors are often tempted to take advantage of defaulting debtors.[42] Additionally, the court rejected the idea that creditors' actions are always so repugnant that they bar a deficiency judgment. The court, therefore, acknowledged that neither the creditor nor the debtor is completely lacking in fault. After all, the debtor's obligation should not be ignored simply because the creditor has acted erroneously. To do so would unjustly enrich the debtor. This is not to suggest that the court should ignore possible overreaching by creditors. By purposefully or accidentally failing to follow Code procedures, the creditor may have deprived the debtor of the full value of the automobile. The court's shifting of the burden to the creditor provides adequate protection of both parties' interests.

In *Rhodes v. Oaklawn Bank*,[43] however, the Arkansas Supreme Court provided increased protection for debtors. In that case, the bank repossessed restaurant equipment from a defaulting debtor.[44] Later, the bank sold the equipment without notifying the debtor.[45] On appeal from the grant of a deficiency judgment, the court held that because the bank did not give notice, it was not "entitled" to a judgment.[46] Curiously, the court did not remand the case so that the bank could attempt to meet the *Norton* standard. As a result, the decision could be interpreted in two ways. First, that as a matter of law, a creditor that fails to provide notice can never meet the *Norton* standard. A second, more expansive reading of the decision would lead to the conclusion that *Norton* was simply overruled and that a failure to comply with the U.C.C. in any respect caused the creditor to forfeit the deficiency.

This issue was decided in *First State Bank of Morritton v. Hallett*,[47] where the bank repossessed the debtor's car and sold it without notice.[48] As if intending to put the matter finally to rest, the court stated that "the rule and requirement are simple. If the secured creditor wishes a deficiency judgment he must obey the law. If he does not obey the law, he may not have his deficiency judgment."[49]

The language chosen by the court was sufficiently expansive not only to overrule the *Norton* case, but also to conclude that, at least in Arkansas, any violation of the Article 9 protections is enough to preclude a deficiency judgment.

As representative of the majority rule, *Hallett* appears to be an outgrowth of sympathy for defaulting debtors. Most cases, after all, involve a relatively large institutional creditor against a nearly destitute debtor. It is no wonder, then, that *Hallett* represents the majority. It is also clear that sympathy may be the attorney's best weapon in automobile repossession cases. In analyzing the equities of the forfeiture penalty, there can be no other conclusion than that it is an attempt to give debtors a break.

Conclusion

There are many practical and legal approaches to automobile repossession cases. None of these approaches is very successful, however, unless the problem is brought to an attorney's attention in a timely manner. This merely states the obvious. Yet, one would think that the proposition is terribly complex, given the frequency with which clients seek help after repossessions. Recognizing and attempting to prevent client procrastination, therefore, is the first step for any attorney involved in an automobile repossession case.

Once this step is taken, the attorney can begin to apply practical solutions in an effort to prevent the repossession. Many suggestions, such as an extension or refinancing, do

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[36] *See, e.g.*, J. White and R. Summers, *supra* note 1, at 26–15.

[37] 398 S.W.2d 538 (Ark. 1966).

[38] *Id.* at 539.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 542.

[42] *See supra* note 5 and accompanying text.

[43] 648 S.W.2d 470 (Ark. 1983).

[44] *Id.*

[45] *Id.* at 471.

[46] *Id.* at 472.

[47] 722 S.W.2d 555 (Ark. 1987).

[48] *Id.*

[49] *Id.* at 557 (quoting Atlas Thrift Co. v. Horan, 27 Cal. App. 3d 999, 104 Cal. Rptr. 315 (1972)).

not necessarily require the services of an attorney. The attorney's participation, however, will increase the probability of preventing repossession.

Even where the attorney is unsuccessful at preventing repossession, it is better for an attorney to become involved early in the process. Once the repossession becomes a reality, the attorney is in a better position to enforce the protective provisions of the U.C.C. These include the right to notice prior to sale and the right to insist that the creditor resell the collateral in a commercially reasonable manner. With respect to resale, the attorney should determine whether the applicable jurisdiction recognizes the forfeiture penalty. Although the forfeiture penalty creates a windfall for the debtor, it is still the most effective means of ensuring that the debtor is not burdened with a large deficiency judgment. In many instances, in fact, preventing or reducing the deficiency judgment will be the only positive aspect of an otherwise totally frustrating experience.

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DAD Notes

The Demise of the *Burton* Demand Prong

In *United States v. McCallister*[1] the Court of Military Appeals shot down the "demand prong" of *United States v. Burton*[2] as a *per se* violation of the accused's right to speedy trial. The court revisited the rationale of *Burton's* "demand prong" and explained that Rule for Courts-Martial 707,[3] along with the *Burton* 90-day rule and the four-part sixth amendment standard set forth in *Barker v. Wingo*,[4] adequately protect an accused's right to speedy trial. Has this ruling made a demand for speedy trial a lifeless defense request?

In *Barker*, the United States Supreme Court held that, due to the relative nature of the speedy trial right, courts should approach each claim of denial of speedy trial on an *ad hoc* basis. To provide guidance, the Court set out a broad constitutional standard. The Court explained that the lower courts should balance four factors to determine if an accused had been denied the right to speedy trial: 1) the length of the delay; 2) the reason for the delay; 3) the accused's assertion of his right; and 4) the prejudice to the defendant caused by the delay.[5]

In *McCallister*, the appellant was found guilty of absence without leave and wrongful appropriation. Pursuant to the demand prong of *Burton*, appellant made an oral demand for speedy trial two days after being placed in pretrial confinement. Two days later, he made a written demand. The government did not specifically respond to these demands and waited a while before moving forward with a view toward trial. Ten days after the written demand, the government appointed an investigating officer under article 32.[6] At trial, appellant maintained that the government had not responded to his demands. Appellant contended that the failure to respond deprived him of his right to a speedy trial and therefore required dismissal of the wrongful appropriation specification.

The Army Court of Military Review had stated that it did not believe the *Burton* demand rule was intended to result in automatic dismissal where the accused's rights had not been violated by the delay.[7] To determine whether appellant's right to speedy trial had in fact been prejudiced by the government's failure to respond to appellant's demands, the Army court analyzed the government's failure to respond to appellant's demands under the sixth amendment standards of *Barker* in conjunction with the *Burton* demand rule, and held that the government's appointment of an investigating officer was sufficient response to appellant's demands and was evidence of the government's diligence in disposing of the case.[8]

The Court of Military Appeals eliminated "sufficiency of the government's response" from the analysis and specifically overruled the "demand prong" of *Burton*. The court stated that *Burton* was decided before the President

[1] 27 M.J. 138 (C.M.A. 1988).

[2] 44 C.M.R. 166 (C.M.A. 1971).

[3] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 707 [hereinafter R.C.M.].

[4] 407 U.S. 512 (1972).

[5] *Id.* at 530.

[6] Uniform Code of Military Justice art. 32, 10 U.S.C. § 932 (1982).

[7] 24 M.J. 881 (A.C.M.R. 1988).

[8] *Id.* at 892.

promulgated R.C.M. 707 to provide guidelines for enforcing the right to speedy trial. Now R.C.M. 707 provides specific guidelines that ensure an accused will be brought to trial within 120 days of restraint or preferral of charges, or within 90 days of confinement. Any claim of denial of sixth amendment speedy trial is still examined under the *Barker* analysis. Therefore, "any purpose sought to be served originally by the 'demand prong' of *Burton* is now fully met by the three sets of protections mentioned."[9]

In light of *McCallister* there are now four standards for determining speedy trial: 1) the 120-day standard of R.C.M. 707(a); 2) the 90-day standard of R.C.M. 707(d); 3) the *Burton* 90-day rule;[10] and 4) the sixth amendment guarantee. An accused's unanswered demand for speedy trial alone *per se* is no longer grounds for dismissal, but such a demand is still an important element to consider when litigating an accused's claim of denial. Therefore an accused should still make demands for speedy trial and trial defense counsel should ensure the "demand prong" lives beyond its *Burton* demise. CPT Patricia D. White.

Murphy's Law: The Rating Chain—Still an Issue Regarding Challenges of Court Members?

In *United States v. Murphy*,[11] the Court of Military Appeals struck down a *per se* rule of disqualification for a panel member who wrote or endorsed the efficiency reports of a junior member. Although the court in *Murphy I* eliminates the mere presence of a rating relationship among members as an automatic challenge for cause, defense counsel at trial may nonetheless try to establish that such a relationship presents actual grounds for challenge. Furthermore, counsel in the field should continue in their endeavor to demonstrate that these rating relationships are improper *per se* in all cases by developing a record that will support a general rule challenging the notion that these relationships are essentially benign.

To fully understand the significance of the decision in *Murphy I*, counsel should be aware of what the Court of Military Appeals did not decide. The court did not sanction the appointment of members who stand in rating relationships with one another. The court simply found that the Air Force Court of Military Review had not justified the imposition of an absolute rule of disqualification.

The accused, Staff Sergeant Murphy, had entered guilty pleas to sodomy of a child under 16 years of age, assault, and multiple allegations of indecent acts with a child under 16 years of age.[12] The president of the panel and another senior colonel wrote or endorsed the efficiency reports of two other court-martial members. As a result of their sincere manifestations of impartiality, the military judge denied the asserted challenges for cause against both senior officers.[13]

In their initial decision[14] and on reconsideration,[15] the Air Force court concluded that the mere presence of such a direct supervisory relationship created "an appearance of evil."[16] The sole reason compelling the establishment of a *per se* rule was that the system of justice must appear to be fair to disinterested observers.[17] The Air Force court did not appear to explore any motives that would suggest an impermissible use of these relationships.[18] The court only seems to note that those members involved would not attempt to offer undue influence. Finally, the court did not explain why the rule of disqualification only operated against the senior members of the panel.[19]

Thus, *Murphy II* did not present a factually sufficient foundation upon which to base a substantial change in policy.[20] In fact, in *Murphy III*, the Air Force court invited the Court of Military Appeals to dispute their conclusions.[21] The incorrect application of precedent, the lack of any factual predicate, and the inflexibility of a per se rule regardless of military exigencies rendered the disposition of *Murphy II and III* a foregone conclusion.

It is in this light that the decision of the Court of Military Appeals should be viewed. *Murphy I* narrowly decided the issue by holding that *United States v. Harris*[22] does not compel a *per se* rule of disqualification and that the appropriate factual predicate was not presented to support such an absolute prohibition. *Murphy I* did not, however, find that superior-subordinate relationships were not subject to

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[9] *McCallister*, 27 M.J. 138, 140–41.

[10] Although the court's opinion implies that R.C.M. 707(d) fully incorporates the *Burton* 90-day rule, not all periods of exclusions applicable to R.C.M. 707(d) are deductible under *Burton*. Therefore, it is possible to have a *Burton* violation despite compliance with R.C.M. 707(d). *See* R.C.M. 707(d) analysis.

[11] 26 M.J. 454 (C.M.A. 1988) [hereinafter *Murphy I*].

[12] United States v. Murphy, 23 M.J. 690, 691 (A.F.C.M.R. 1986) [hereinafter *Murphy II*].

[13] *Id.*

[14] *Id.*

[15] United States v. Murphy, 23 M.J. 764, 765 (A.F.C.M.R. 1986) (on reconsideration) [hereinafter *Murphy III*].

[16] *Id.*

[17] *Id.* In analyzing the appearance of impropriety, the Air Force court relied extensively on United States v. Harris, 13 M.J. 288 (C.M.A. 1982). To the extent that *Harris* relied upon other factors beyond the mere existence of a rating relationship, the Air Force court was incorrect in finding that prior precedent compelled a *per se* rule of disqualification. *Murphy I*, 26 M.J. at 456.

[18] There were no apparent allegations that the convening authority was attempting to orchestrate the outcome by exerting influence through these rating schemes. Nor did the court mention the presence of opinionated senior members who would attempt to influence attitudes of those junior in rank. Finally, there was no discussion demonstrating that these junior officers felt intimidated or had been adversely rated for past court-martial participation or any other military justice matters.

[19] United States v. Garcia, 26 M.J. 844, 846 n.1 (A.C.M.R. 1988).

[20] Furthermore, *Murphy II* failed to make reference to any allegations of impropriety that would overcome the presumption that officers or enlisted members would properly exercise their duties.

[21] "We are aware that a higher appellate court might well disagree with our conclusion and the reasoning supporting it. We welcome their guidance." *Murphy III*, 23 M.J. at 765.

[22] 13 M.J. 288.

abuse. Judge Cox, writing for the majority, cautioned that "convening authorities should avoid placing superior-subordinate combinations on courts-martial to the extent practicable."[23] Although not a statement of condemnation, such a warning recognizes that these relationships between superior-subordinates may create real conflicts.

The Army Court of Military Review has also acknowledged the sensitive nature of rating relationships between panel members. Although declining to find such a relationship *per se* improper, the Army court denominated these associations as "a matter of concern."[24] Furthermore, the Army court leaves open the possibility that a proper "overriding social or judicial concern" could support the imposition of a general prophylactic rule to guard against abuses arising from superior-subordinate rating relationships among members.[25] However, the court clearly implies that the factual basis for a general rule does not currently exist.

Nevertheless, the rating relationship may present a problem in a particular case, and should therefore be evaluated on a case-by-case basis. More importantly, counsel should continue to search for the appropriate factual basis that would support a general rule of disqualification instead of expending resources in a case-by-case fashion. Even though the Army court seems disposed to consider a factually sufficient basis for such a general rule, the most powerful source of encouragement comes from the statements by Judge Cox regarding the absence of documentation supporting any allegation of intimidation through the use of efficiency reports or the downgrading of a report as a result of that member's participation in the court-martial process. Quite simply, Judge Cox felt that defense counsel at all levels have failed to present a record wherein the Court of Military Appeals could act in such an obviously sensitive area. The court will not infer bias in matters of officer integrity because the court must deal in facts, not innuendo.

While a *per se* rule of disqualification without any supporting factual predicate may not be warranted, an assumption that rating schemes can never be used or perceived to influence trial outcomes is unsound. Therefore, defense counsel should not relent merely because trial counsel contends that *Murphy I* ends the discussion. The express language of article 37(b)[26] acknowledges the very real existence of a problem and proscribes the use of efficiency reports to influence the result in a court-martial. Unfortunately, article 37(b) is only effective against overt attempts to exercise influence, and can only serve as a moral guidepost against surreptitious attempts to undermine the deliberative process.[27] Even assuming that superior officers have refrained and will continue to refrain from exerting any undue influence,[28] another problem remains in that the perceptions held by the rated member may affect the deliberative process.[29] Whether or not the superior member intentionally exerts influence, the junior member may feel inhibited in the free exercise of judgement.[30] As was stated by Judge Ferguson: "The lifeblood of any officer's career is his efficiency report."[31] Judge Ferguson noted that advocacy of matters in behalf of an accused could directly jeopardize an officer's career. "These are not fantasies. They are the very real and hard facts of military life."[32]

Counsel in the field need to be prepared to explore and exhaust the limits of these rating relationships. *Murphy I* and *United States v. Garcia*,[33] do stand for the proposition that *extensive* voir dire on this subject is necessary. Counsel should look for strongly held beliefs of rating members. Also, the reputation of the rater in matters of military justice is important. Consideration should also be given to statements and intentions of the convening authority with regard to particular types of offenses. Although probably not intended to influence the court-martial process, the stated desire of a general officer to deal severely with drug offenders may develop its own inertia and transmit harsh penalties through the inherently conductive features of superior-subordinate rating schemes. This problem becomes more acute whenever the convening authority selects raters that are people that he knows personally.

Counsel should also inquire into the past efficiency reports of rated members to ascertain whether they believe they have ever been adversely rated as a result of their participation in a court-martial. Initially, counsel should identify those members who have been involved in previous court-martial actions either as members or witnesses. Counsel may then want to ascertain on the record whether any member received a rating which in their individual opinion was less than deserved. Individual voir dire should then follow up on this line of questioning by asking whether there is any relationship between the court-martial service and the low rating, and if there is, what affect will that have on the member.[34] Finally, counsel may also desire to ask whether any other member of the panel believes that the

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[23] *Murphy I*, 26 M.J. at 456 n.*.

[24] *Garcia*, 26 M.J. at 845; United States v. Eberhardt, 24 M.J. 944, 946 (A.C.M.R. 1987).

[25] *Garcia*, 26 M.J. 845.

[26] Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (1982) [hereinafter UCMJ].

[27] In United States v. Hubbard, 43 C.M.R. 322, 327 (C.M.A. 1971) (Ferguson, J., dissenting), it was noted that prosecutions for a violation of UCMJ art. 37 are not common and the only method of eliminating evil is by "exorcising its foundation."

[28] The Army Court of Military Review has recognized that a rater may attempt to influence a rated individual." *Eberhardt*, 24 M.J. at 947.

[29] *Id.* (The court acknowledges that a rated officer may be influenced simply by the presence of his rater on the same panel.).

[30] In United States v. Deain, 17 C.M.R. 44, 55 (C.M.A. 1954) (Latimer, J., concurring) (wherein it was error to allow the president of the court to rate the member participants solely on the basis of their judicial duties), it was noted that junior officers in the presence of their rater may not possess the same freedom of expression and "in the background would be the desire to accomplish the task to the satisfaction of a reporting officer."

[31] *Hubbard*, 43 C.M.R. at 325.

[32] *Id.* Although *Hubbard* involved a rating relationship between trial counsel and defense counsel, the logic compelling Judge Ferguson's remarks is equally applicable to the dynamics between members in their deliberative process.

[33] 26 M.J. 844.

[34] Again, any matters of officer integrity are bound to be sensitive. Counsel should be sure of their own instincts and pretrial research when questioning about highly personal matters.

disclosed rating relationship may effect the deliberations of the panel or if the members are aware of any rating relationships that have affected court-martial practice in the past. Counsel should also determine whether each member would feel more comfortable if there were no superior-subordinate relationships between members of the same rating chain.

All of the above questions involve considerations of command influence. Therefore, counsel should use their ingenuity in fashioning other inquiries that can develop the subtleties in command and control hierarchies. In the vast majority of inquiries, the results will probably be negative. Nonetheless, only when the appellate courts are presented with a proper record, will they be in a position to recognize the value of an absolute rule of disqualification or the error in denying a particular challenge for cause.[35] Clearly, this is a situation where the appearance of impropriety must be proved because of the very important competing interests involving military integrity. However, as can be demonstrated by counsel in the field, the presence of rating relationships is an unnecessary strain on the appearance of fairness in court-martial practice. Trial defense counsel must continue their vigilance and efforts to demonstrate that if something can go wrong, it will. Or maybe, it already has. Captain Ralph L. Gonzalez.

The Providence Inquiry and Rule for Courts-Martial 1001(b)(4)

In *United States v. Holt*[36] the Court of Military Appeals upheld the decision of the Army Court of Military Review,[37] and ruled that the testimony of an accused at the providence hearing *may* constitute a proper matter in aggravation during the sentencing phase of trial. The court determined, "this [providence] testimony should be admissible as an admission by the accused to aggravating circumstances" surrounding the offense.[38]

The *Holt* decision could initially be incorrectly viewed as expanding the scope of aggravation evidence which is admissible, as directly relating to the charged offense in sentencing, to the entire providence inquiry.[39] Indeed, the court found that such testimony elicited during the providence inquiry, at a trial with members, could be introduced to members by "either a properly authenticated transcript or by the testimony of a court reporter or other person who heard what the accused said during the providence inquiry."[40] A closer examination of *Holt*, however, reveals that the court has not disturbed its precedent concerning what constitutes properly admissible evidence as being "directly related" to an offense of which the accused has been found guilty, under Rule for Courts-Martial 1001(b)(4).

In *Holt*, the accused pled guilty to provoking speech and wrongful distribution of methamphetamine. During the providence inquiry on the drug offense, the accused testified he was asked by a Criminal Investigation Command (CID) registered source to obtain some drugs. The accused told the registered source that he would have to locate his roommate to obtain the drugs. The accused told the military judge that he found his roommate asleep in another soldier's room. Unable to arouse his roommate, the accused asked and obtained information from the other soldier on the location of the drug source. During the sentencing phase of trial, a CID special agent testified for the defense as to the accused's cooperation in the investigation. On cross-examination, the agent related that the accused, in a sworn statement, identified his *roommate* as the source of information on where the drugs could be obtained. In his argument on sentence, trial counsel highlighted this variance to the accused's sworn testimony during the providence inquiry, implying the accused was dishonest either in his sworn statement to CID or in his testimony at trial. Defense counsel did not object to this cross-examination or argument of trial counsel.

On appeal, Sergeant Holt urged that the trial counsel's use of material from the providence inquiry violated his privilege against self-incrimination.[41] In addressing this allegation of error, the Court of Military Appeals refused to rule that an accused's testimony during a providence inquiry was *per se* inadmissible during the sentencing phase of trial. Specifically, the court found that an accused is on notice that such testimony can be used against him for findings *and sentencing if* the testimony is "directly related" to the offenses to which he has pled guilty.[42] If the military judge's inquiry elicits uncharged misconduct *not* closely related to the offense to which the accused has pled guilty, the consideration of such uncharged misconduct would not be foreseeable by the accused. Thus, "the waiver of article 31, UCMJ, 10 U.S.C. § 831, rights and the privilege against self-incrimination involved in entering pleas of guilty would not extend to this uncharged misconduct."[43] The court found such uncharged misconduct, *upon defense objection*, should not be considered in sentencing.[44] In *Holt* the defense counsel did not object to trial counsel's argument on sentencing. The court determined that trial counsel's use of uncharged misconduct from the providence inquiry did not constitute plain error.[45]

Trial defense counsel should be wary of an aggressive interpretation of *Holt* by trial counsel to justify the introduction of evidence of uncharged misconduct inadmissible under R.C.M. 1001(b)(4). Defense counsel should object to the admission of such evidence as violative of the Rules for Courts-Martial and the accused's UCMJ art. 31

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[35] *Garcia*, 26 M.J. at 845.

[36] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[37] United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986).

[38] *Holt*, 27 M.J. at 60.

[39] *See* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1001(b)(4) [hereinafter R.C.M.].

[40] *Holt*, 27 M.J. at 61.

[41] *Id.* at 58.

[42] *Id.* at 59.

[43] *Id.* at 60.

[44] *Id.*

[45] *Id.* at 61.

rights.[46] Defense counsel should also require trial counsel to specify the theory of admissibility of such uncharged misconduct under R.C.M. 1001(b)(4).[47] Further, defense counsel should request specific findings from the military judge when ruling on the objection. Captain Jeffrey J. Fleming.

[46] In a similar case, but where defense counsel did interpose an objection to consideration of uncharged misconduct elicited from the accused in the providence inquiry, the Court of Military Appeals set aside the decision of the Army court and remanded the case for further review in light of *Holt*. *See* United States v. Whitt, U.S.C.M.A. Dkt. No. 57,576/AR (C.M.A. 29 Sept. 1988) (order).

[47] *See* Gonzalez, *A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense*, The Army Lawyer, Sept. 1988, at 37 (an excellent analysis of R.C.M. 1001(b)(4) for use by trial defense counsel).

Government Appellate Division Note

Review of Courts-Martial by the Supreme Court of the United States—Miles to Go Before We Sleep

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"General and special courts-martial resemble judicial proceedings . . ."

Justice Rehnquist, writing for the Supreme Court in *Middendorf v. Henry*.[1]

"[C]ourts-Martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."

Justice Douglas, writing for the Supreme Court in *O'Callahan v. Parker*[2]

Introduction

As those of us who are close to the military justice system know, "military justice" has undergone sweeping reform since the Supreme Court announced its decision in *O'Callahan*.[3] In 1983 Congress took a dramatic step in providing reform by authorizing direct review of Court of Military Appeals' decisions by the Supreme Court on *writ of certiorari*.[4] Congress provided this review in order to reduce the burden on soldiers attempting to reach the Supreme Court by collateral attack of their convictions, and to provide the government a vehicle to obtain review of decisions of the Court of Military Appeals.[5]

Our system in the military is now open to scrutiny before the high court on a routine basis. The press, the litigants, and the Supreme Court will review every feature of the military justice system. As practitioners, we must approach and prepare every court-martial as if it will receive Supreme Court review. In *United States v. Goodson*[6] the Court reviewed a BCD special court-martial involving a handful of drugs. With this in mind, many issues of constitutional proportion loom ahead, and this article will highlight some of those issues.

Justice Rehnquist declined to provide a ringing endorsement of the fair-mindedness of the military justice system in *Solorio v. United States*.[7] Rather, his holding was based on "the dearth of historical support for the *O'Callahan* holding," and the "confusion wrought by" that holding.[8] The dissenting justices made clear that they will closely scrutinize the system's procedural safeguards and results because, in their view, the military justice system intentionally withholds constitutional protections, is governed by unlawful command influence, and needs still more legislative reform.[9]

*The author gratefully acknowledges the many talented authors of government briefs in the Government Appellate Division who aided in the preparation of this article.

[1] 425 U.S. 25, 31 (1976).

[2] 395 U.S. 258, 265 (1969).

[3] *See infra* notes 89 through 109.

[4] The Military Justice Act of 1983, Pub. L. No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

[5] Effron, *Supreme Court Review of Decisions by the Court of Military Appeals: The Legislative Background*, The Army Lawyer, Jan. 1985, at 61.

[6] United States v. Goodson, 14 M.J. 542 (A.C.M.R. 1982), *aff'd*, 18 M.J. 243 (C.M.A. 1984), *vacated and remanded*, 105 S. Ct. 2129 (1985).

[7] 107 S. Ct. 2924 (1987).

[8] 107 S. Ct. at 2931, 2933.

[9] 107 S. Ct. at 2938, 2941 ("The trial of any person before a court-martial encompasses a deliberate decision to withhold procedural protections guaranteed by the Constitution.") ("[M]embers of the armed forces may be subjected virtually without limit to the vagaries of military control.") (congressional action required and encouraged) Marshall, J., dissenting.

The Supreme Court recently expressed interest in whether a small court-martial panel, voting by two-thirds verdict, accords the soldier due process of law under the fifth amendment. In *Mason v. United States* the Solicitor General waived his response to Mason's claims, and the Court requested the Solicitor to submit a brief in opposition.[10] Mason and her fellow soldiers like Robert R. Garwood and Jaime B. Mendrano make a two-fold constitutional argument.[11] First, relying on the Supreme Court's holding in *Burch v. Louisiana*,[12] they claim that small panels of court members cannot render a fair trial when two-thirds verdicts are used. Second, relying on the Supreme Court's holding in *Ballew v. Georgia*,[13] they claim that five-member courts can never render a fair trial and due process because of their size.

The review of the law that follows demonstrates that Mason's arguments will probably fail. The prudent course, however, is to detail at least ten court members to a general court-martial so that at least six will serve after *voir dire*. Special courts-martial pose less of a problem because they are not felony courts *per se*.[14] The prudent course, however, is to detail ten members; the fact that BCD special courts can give punitive discharges may be sufficient for them to be treated as felony courts. Additionally, BCD special courts have drawn the Supreme Court's attention before.[15] Mason and future petitioners seek to impose on courts-martial the same requirements the sixth amendment demands of trials by jury. Such an argument fails because the right to jury trial does not apply to courts-martial.[16] The fifth amendment specifically exempts "cases arising in the land and naval forces" from the requirement that a defendant be indicted by a grand jury. The Supreme Court has held that the Framers also "meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."[17] The Court has also ruled that neither section 2 of article III of the Constitution nor the sixth amendment requires a trial by jury in the armed forces. Those provisions were intended "to preserve unimpaired trial by jury in all those cases in which it had been recognized by common law . . . but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right."[18] In short, soldiers enjoy no right to a sixth amendment trial by jury or its attendant unanimous jury verdict requirement.

In any event, a large court-martial may render a constitutional verdict because a nine out of twelve verdict (three-fourths) has been held lawful by the Supreme Court. The Court held that such a verdict does not violate the due process guarantee by diluting the reasonable doubt standard.[19] Similarly, a verdict by ten of twelve jurors does not violate the fifth or sixth amendment.[20] Unanimous verdicts are required by the constitution only when a six-person jury is used.[21] Finally, the congressional policy of providing one trial, decided by two-thirds or three-quarters verdict without any retrial, is a rational step toward achieving a disciplined, well-trained, military force. Such a system provides defendants "a significant recompense" in exchange for a non-unanimous verdict.[22]

On the other hand, the due process argument squarely raises the issue of court-martial size.[23] In *Burch* the Supreme Court concluded that fact-finding bodies must be of "sufficient size to promote group deliberation, free from outside intimidation, and to provide a fair possibility that a cross section of the community will be represented on it."[24]

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[10] Mason v. United States, 24 M.J. 127 (C.M.A. 1987) (summary disposition), *cert. denied*, 108 S. Ct. 257 (1987).

[11] United States v. Garwood, 16 M.J. 863 (N.M.C.M.R. 1983) (rejected without discussion alleged fifth amendment denial by a five member court), *aff'd*, 20 M.J. 148 (C.M.A.) (court refused to grant review on due process question of five-member court), *cert. denied*, 106 S. Ct. 524 (1985) (court declined to review whether Garwood was denied due process of law when convicted upon two-thirds verdict of five-member court-martial or whether military judge's public comments during trial denied petitioner's right to a fair trial). "The blackletter law remains that the denial of a writ of certiorari imports no expression upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.S. 482, 490 (1923). *See* R. Stern, E. Gressman, and S. Shapiro, Supreme Court Practice § 5.7 at 269–273 (6th ed. 1986). Mendrano argues his case on collateral attack. Mendrano v. Smith, 797 F.2d 1538 (10th Cir. 1986).

[12] Burch v. Louisiana, 441 U.S. 130 (1979) (six-person juries must use unanimous verdicts).

[13] Ballew v. Georgia, 435 U.S. 223, 339 (1978) (five-person juries violate the sixth amendment right to jury trial).

[14] *Accord* Baldwin v. New York, 399 U.S. 66, 69 (1970) (trial by jury right vests "where imprisonment for more than six months is authorized.") (plurality opinion).

[15] *Goodson*, 105 S. Ct. 2129 (1985).

[16] *E.g.*, O'Callahan v. Parker, 395 U.S. 258, 261 (1969), *overruled on other grounds*, Solorio v. United States, 107 S. Ct. 2924 (1987); Reid v. Covert, 354 U.S. 1, 19 (1957) (plurality opinion); Whelchel v. McDonald, 340 U.S. 122, 127 (1950); Ex Parte Quirin, 317 U.S. 1, 40–41 (1942); Kahn v. Anderson, 255 U.S. 1 (1921); *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866). *See* Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1857) (power to provide for trial and punishment of military offenses is independent of judicial power); Mendrano v. Smith, 797 F.2d at 1544; Owens v. Markley, 289 F.2d 751, 752 (7th Cir. 1961) (both holding that service member is not entitled to jury trial). *See generally* Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 Cornell L. Rev. 363 (1972); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 Harv. L. Rev. 293 (1957).

[17] *Ex Parte* Milligan, 71 U.S. 2, 123 (1866).

[18] *Ex Parte* Quirin, 317 U.S. 1, 39 (1942); *Mendrano*, 797 F.2d at 1543–44.

[19] Johnson v. Louisiana, 406 U.S. 356, 363 (1972).

[20] Apodaca v. Oregon, 406 U.S. 404, 410–12 (1972). *See Mendrano*, 797 F.2d at 1538 (three-quarters verdict in murder and rape conviction by six-officer panel upheld on collateral attack).

[21] *Burch*, 441 U.S. at 138.

[22] *Mendrano*, 797 F.2d at 1546.

[23] "[W]hat constitutes due process in a trial by a military tribunal is gauged by the principles of military law enacted by Congress, provided the accused is given due notice of the charge against him, a fair opportunity to prepare his defense, and his guilt is adjudged by a competent tribunal" (footnote omitted). De War v. Hunter, 170 F.2d 993, 997 (10th Cir. 1948), *cert. denied*, 337 U.S. 997, *reh. denied*, 337 U.S. 934 (1949). An excellent discussion of due process accorded to soldiers is found in *Mendrano*, 797 F.2d at 1545. An overview of the Bill of Rights applied to soldiers is found in Gilligan, *The Bill of Rights and Service Members*, The Army Lawyer, Dec. 1987, at 3, 9, 11, as well as a state by state analysis of verdict size in criminal cases. *See generally* Rosen, *Thinking About Due Process*, The Army Lawyer, Mar. 1988, at 3.

[24] *Burch*, 441 U.S. at 135.

The Court similarly found in *Ballew* that a five-person jury failed to preserve "the purpose and functioning of the jury in a criminal trial"[25] because: 1) group deliberation is not adequate in groups composed of less than six persons;[26] 2) the accuracy of results is not adequate;[27] 3) defense verdicts are cut in half in small groups;[28] 4) ethnic and minority representation is reduced in small groups;[29] and 5) juries decide the close cases in the criminal justice system, and any judgment on size should be *in favor* of larger juries.[30]

The Court found the optimal size group to be six to eight persons, and held that at least a six-person group was absolutely required.[31]

A five-member premeditated murder court-martial does not compare favorably with the *Ballew* findings, and such a panel may not deliver the "competent tribunal" mandated by due process.[32] This is especially true because Congress appears to have chosen the number "five" based on whim and caprice, while the Supreme Court has exhaustively studied the issue. Private E–2 Nathaniel Johnson, Jr., will surely raise this issue as he was convicted of premeditated murder and unlawful possession of a knife by a five-officer court at Fort Eustis, Virginia. Johnson was sentenced to life imprisonment.[33] No doubt Congress's judgment about size and voting for courts-martial is entitled to "particular deference." This is so because "Congress has the primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."[34] Also, "great deference [is accorded] to the professional judgement of military authorities concerning the relative importance of a particular interest."[35] Unfortunately, the military courts and the President, through the Manual for Courts-Martial, have simply rejected the due process concerns of *Burch* and *Ballew* without any articulated professional judgment as to why five-member courts are lawful.[36]

The government in *Mason* would have the Court give great deference in the composition and voting of courts-martial simply because the practices predate the constitution and have been used throughout our history.[37] Yet the history of court-martial size and voting is a patchwork of codes, tradition, and caprice. The nation's first military code, the Articles of War of 1776, required at least thirteen members on a general court-martial and at least five on a "regimental" court-martial, as did their predecessors, the British Articles of War and the Massachusetts Articles of War.[38] In 1786 Congress changed the minimum number of general court-martial members to five officers,[39] and stated in their preamble:

> Whereas, crimes may be committed by officers and soldiers serving in small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and articles of war [13], in consequence of which criminals may escape punishment, to the great injury of the discipline of the troops and public service.[40]

In 1827 the Supreme Court found the number thirteen to be merely directory to the convening authority under the 1806 Articles of War, and so upheld a conviction by a six-member court.[41]

While the Supreme Court has adopted the number six after exhaustive analysis in *Burch* and *Ballew*, Congress has selected the number five because of the needs of the Army and Navy in the eighteenth century. A prudent trial counsel will ensure that six members are sitting after *voir dire*. Congress's judgment in 1786 about small units in remote locations hardly applies in this century. Besides, providing at least six members after *voir dire* is a small price to pay to

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[25] *Ballew*, 435 U.S. at 239, 241–43.

[26] *Id.* at 232–33.

[27] *Id.* at 234–35.

[28] *Id.* at 236.

[29] *Id.* at 236–37.

[30] *Id.* at 237–39. *See generally* Williams v. Florida, 399 U.S. 78, 100 (1970).

[31] *Ballew*, 435 U.S. at 234, 239. The *Mendrano* court had six members and thus the size issue was not reached in that decision. *Mendrano*, 797 F.2d at 1539.

[32] *See supra* note 23.

[33] United States v. Johnson, CM 8700268 (A.C.M.R. 30 Nov. 1987), *aff'd*, 26 M.J. 222 (C.M.A. 1988) (five members; no determination as to unanimity).

[34] *Solorio*, 107 S. Ct. at 2931. *See* Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion); Whelchel v. McDonald, 340 U.S. 122, 127 (1950).

[35] Goldman v. Weinberger, 106 S. Ct. 1310, 1311 (1986).

[36] *Mendrano*, 797 F.2d at 1545; United States v. Guilford, 8 M.J. 598, 601–02 (A.C.M.R. 1979), *petition denied*, 8 M.J. 242 (C.M.A. 1980). *See* United States v. Neeley, 21 M.J. 606, 609 (A.F.C.M.R. 1985); United States v. Seivers, 9 M.J. 612, 615 (A.C.M.R.), *aff'd*, 9 M.J. 397 (C.M.A. 1980); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 503(a) [hereinafter R.C.M.], and R.C.M. 601 analysis (silence as to number of members recommended). The Manual for Courts-Martial is promulgated by the President pursuant to his constitutional authority as Commander-in-Chief of the Armed Forces (U.S. Const. art. II, § 2), and pursuant to a statutory delegation of Congress's power to "make Rules for the Government and Regulation of the land and naval forces" (U.S. Const. art. I, § 8, cl. 14). Article 36, Uniform Code of Military Justice, 10 U.S.C. §§ 801–940 (1982) [hereinafter UCMJ], delegates to the President the authority to prescribe procedural and evidentiary rules governing trials by court-martial.

[37] Brief for The United States in Opposition, Mason v. United States, No. 86–1935, 7.

[38] Articles of War of 1776, arts. 5 and 10, §§ 14 and 15, *reprinted in* 5 J. Continental Cong. 800–01 (W. Ford ed. 1906); W. Winthrop, Military Law and Precedents, 21–22, 534, app. 921, 493, arts. 5 and 10, §§ 14 and 15, app. 947–60, 972 (2d ed. 1920 reprint); Massachusetts Articles of War, articles 32 and 37, reprinted in W. Winthrop, *supra*, at 947. *See also* W. Aycock and S. Wurfel, Military Law Under the Uniform Code of Military Justice 10 (1955).

[39] Articles of War of 1776 (as amended in 1786) art. 1, § 14. *See* W. Aycock and S. Wurfel, *supra* note 38, at 11; and W. Winthrop, *supra* note 38, at 23, 159. *See also* American Articles of War of 1806, art. 64, 2 Stat. 359, 367, reprinted in W. Winthrop, *supra* note 38, at 976, app. 981; American Articles of War of 1874, art. 75, 18 Stat. 228 (1874), reprinted in W. Winthrop, *supra* note 38, at app. 986; American Articles of War of 1916, ch. 418, art. 43, 39 Stat. 657.

[40] Schlueter, *The Court-Martial: An Historical Survey*, 87 Mil. L. Rev. 129, 147–48; Van Loan, *supra* note 16, at 384, 385 n. 118.

[41] Martin v. Mott, 25 U.S. (12 Wheat) 19, 20, 34–35 (1827); *accord* Bishop v. United States, 197 U.S. 334, 339–40 (1904).

accord the defendant a fair and competent tribunal, as the fifth amendment demands.[42]

Joinder—Do We Have To?

Trial counsel, staff judge advocates, and ultimately the convening authority decide whether to join all known offenses in one trial.[43] The President has advised: "In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious or minor offenses or both, regardless whether related . . ."[44]

The question for trial counsel, raised before the Supreme Court in *United States v. Simmons*, is whether the disparity of offenses and the ensuing prejudice to the soldier are so great as to deny the soldier a fair trial in contravention of the fifth amendment.[45]

First, the trial counsel does have prosecutorial discretion in advising commanders and may properly use it.[46] Second, the trial counsel should evaluate each specification in light of all other specifications and consider such factors as the seriousness of offense, witness availability, quality of evidence, similar character, same act or transaction, and common scheme or plan.[47] Finally, the military system *favors* joinder of all offenses against the accused,[48] and if a motion to sever is made, trial counsel should articulate the armed forces policy on joinder:

(1) While courts-martial are crucial to maintaining discipline, they divert resources from military readiness and thus "the basic fighting purpose of armies is not served."[49]

(2) Convening fewer courts-martial reduces the diversion of soldiers time from primary military assignments and training, thereby enhancing readiness.[50]

(3) Convening fewer courts-martial promotes unit integrity and cohesion by minimizing soldiers absence from their units.[51]

(4) Convening one court-martial for a soldier promotes high morale and discipline by providing prompt, visible remedies for all known crimes and breaches of discipline.[52]

(5) The President as Commander-in-Chief has concluded that separate trials are "too unwieldy to be effective, particularly in combat or deployment."[53]

Simmons tested these policies in his court-martial as he faced a premeditated murder charge and an unrelated aggravated assault charge.[54] On rebuttal the prosecution produced two witnesses who testified that Simmons had a reputation for violence, which was relevant only to the unrelated aggravated assault charge.[55] Simmons claimed that he was deprived his due process right to a fair trial, notwithstanding the curative instruction given the members.

Review was denied for three reasons. First, the President's policy on joinder is a good one, and is accorded "great deference" by the Supreme Court because it is a sound "professional judgment of military authorities concerning the relative importance of a particular military interest."[56] Second, misjoinder is not a *per se* violation of due process.[57] Even if misjoinder raised such prejudice as to approach denial of a fair trial under due process,[58] separate trials may not be mandated in any event because certain constitutional rights enjoyed by civilians cannot be accommodated in the military justice system.[59] Third, proper instruction which particularized the evidence on each charge and specification ensured Simmons a fair trial. The violent reputation evidence was not admitted on the murder charge and the military judge so instructed the court.

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[42] *See supra* note 23 (due process in the military defined).

[43] The convening authority makes the final decision at referral. UCMJ arts. 30(b), 22 and 24. The trial counsel, however, exercises prosecutorial discretion and the staff judge advocate advises the convening authority. UCMJ arts. 38 ("trial counsel . . . shall prosecute in the name of the United States"), 34 (SJA advice).

[44] R.C.M. 601(e)(2).

[45] United States v. Simmons, CM 82–5474 (N.M.C.M.R. 30 Nov. 1983), *aff'd*, 21 M.J. 38 (C.M.A. 1985), *cert. denied*, 475 U.S. 1011 (Feb. 24, 1986).

[46] Army Regulation 27–10 makes the American Bar Association Standards for Criminal Justice, the Prosecution Function, and the Defense Function applicable to Army judge advocates involved in courts-martial. Army Reg. 27–10, Legal Services—Military Justice, para. 5–8 (1 July 1985) [hereinafter AR 27–10].

[47] R.C.M. 601(e)(2); Rules 8 and 14, Fed. R. Crim. P.

[48] R.C.M. 601(e)(2) and discussion.

[49] United States *ex rel* Toth v. Quarles, 350 U.S. 11, 17 (1955).

[50] Brief for the United States in opposition, Simmons v. United States, No. 85–857, 6.

[51] *Id.*

[52] *Id.*

[53] R.C.M. 601 analysis. The American Bar Association's Section on Criminal Justice reached the same conclusion, and specifically found that "not only would it be impracticable to incorporate Rule 8(a) [Fed. R. Crim. P.], into military procedure, but the military has the more desirable modern practice." Committee on Criminal Justice and the Military, Section of Criminal Justice, American Bar Association, Comparative Analysis: Federal Rules of Criminal Procedure and Military Practice and Procedure 20 (1982).

[54] Brief for the United States, *supra* note 50, at 2.

[55] *Id.* at 4.

[56] *Goldman v. Weinberger*, 106 S. Ct. at 1311 (deference to professional judgment).

[57] *See, e.g.*, Robinson v. Wyrick, 735 F.2d 1091, 1094 (8th Cir. 1984); Corbett v. Bordenkircher, 615 F.2d 722, 724–26 (6th Cir. 1980); United States v. Seidel, 620 F.2d 1006, 1013 (4th Cir. 1980) (misjoinder only "a violation of a mere procedural rule") (footnote omitted). *See also* Note, *Harmless Error and Misjoinder Under the Federal Rules of Criminal Procedure: A Narrowing Division of Opinion*, 6 Hofstra L. Rev. 533, 540 (1978).

[58] *See supra* note 23 (definition of due process in the military).

[59] *See, e.g.*, Schlesinger v. Councilman, 420 U.S. 738, 746, 757–60 (1975); Parker v. Levy, 417 U.S. 733, 743–52 (1974).

When disparate offenses are joined, the trial counsel must ensure that the members are properly instructed to consider appropriately evidence which is relevant against only certain specifications.[60] Without such careful instructions the prejudice of misjoinder may deprive the soldier of a fair, competent tribunal.

Scientific Reports—Where Is The Scientist?

In the military the accused has no right to confront an expert witness in drug analysis (who appears via a written report), yet the accused does have the right to question a handwriting expert before that expert's report may be admitted. The recent decisions of the Court of Military Appeals in *Broadnax*[61] and *Ridley*[62] may require the trial counsel to explain this distinction in sixth amendment analysis to the military judge, and thereafter, to the Supreme Court.

These decisions force the soldier and his counsel either: (1) to demand the presence of the expert witness who conducted the test, and thus help the government convict the soldier; or (2) to remain silent, forfeit the expert's live testimony, and attempt to preclude admission of the lab report as unauthenticated, as unreliable, or as offered in violation of the soldier's sixth amendment right to confrontation. The defense must affirmatively subpoena the chemist as a defense witness in drug cases,[63] and the defense must request the examiner's presence when asked in all cases involving subjective expert witness reports.[64]

Notwithstanding these rules, the soldier has a constitutional right to confront his accusers and the witnesses against him at his trial.[65] He also enjoys an evidentiary right to an adequate foundation for hearsay to be admitted against him.[66] The contrary military interest has, at last, been articulated by the Court of Military Appeals in *Broadnax*. The military interest is "to avoid unreasonable harassment and undue pressure on the Government [*e.g.*, defense bargaining power] resulting solely from the geographical location of the forensic laboratories . . . in the worldwide military justice system. . . ."[67] Although the President's Manual made "forensic laboratory reports" and "chain of custody documents" admissible under Mil. R. Evid. 803(8)(B) in 1980, the rules and analysis failed to articulate the military interest or necessity that compelled their introduction through hearsay. The Manual does note, however, that "those documents are not matters 'observed by police officers and other personnel acting in a law enforcement capacity.' "[68]

The issue for the Supreme Court is whether they should accord to the President and the Court of Military Appeals "great deference" to this "professional judgement of military authorities concerning the relative importance of [this] particular military interest," as stated in *Goldman v. Weinburger*.[69] This issue will be troublesome for the military because the Court will no doubt refer to their civilian practice, in which the expert almost universally testifies in all trials in order to convince the lay jury of the evaluative system's reliability.

Notwithstanding the obvious sixth amendment problem, the rule for trial counsel is clear. In the routine drug case where chemical testing of blood, urine, or contraband is involved, the expert examiner is not needed to testify unless the accused demands it. In *all* other cases in which expert reports are used, the expert must be called to testify. Not only does this rule ensure a constitutional trial, as the constitutional analysis will demonstrate shortly, it utilizes the trial counsel's well-known ally: scientific evidence and expert testimony with all the accompanying bells and whistles that court members enjoy, and with seeming objective proof by "science."

The constitutional analysis behind this course is sound. The chemist's laboratory test in a drug case involves an objective, non-evaluative test, which several federal circuit courts and innumerable state courts have found admissible without the chemist's testimony.[70] The Fourth Circuit in *Kay* agreed with the Court of Military Appeals in *Broadnax* that a chemist's report is not subjective opinion but "an objective fact, not mere expression of opinion, and its proof by introduction of the certificate violates no constitutional right of the defendant."[71] The Sixth Circuit has gone so far as to hold the chemist plays a non-evaluative role and is not a witness against the defendant; thus the confrontation clause does not even apply.[72]

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[60] Mil. R. Evid. 105.

[61] United States v. Broadnax, 23 M.J. 389 (C.M.A. 1987) (handwriting analysis report improperly admitted without examiner's testimony).

[62] United States v. Ridley, 22 M.J. 351 (C.M.A. 1986) (urine test report properly admitted without chemist's testimony), *cert. denied*, 107 S. Ct. 400 (1986).

[63] *Broadnax*, 23 M.J. at 393–94; United States v. Vietor, 10 M.J. 69, 78 (C.M.A. 1980). *See* United States v. Porter, 12 M.J. 129, 132 (C.M.A. 1981).

[64] *Broadnax*, 23 M.J. at 394.

[65] U.S. Const. amend. VI. *See generally* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[66] Mil. R. Evid. 803(6) and 803(8).

[67] *Broadnax*, 23 M.J. at 394.

[68] Mil. R. Evid. 803(8)(B) analysis at A22–49.

[69] 106 S. Ct. at 1311. The Court of Military Appeals is accorded "great deference" by the Supreme Court on nonconstitutional, military issues. Middendorf v. Henry, 425 U.S. 25, 43 (1976). *See* Burns v. Wilson, 346 U.S. 137, 140–42 (1953) (plurality opinion).

[70] *See, e.g.*, United States v. Parker, 491 F.2d 517, 520–21 (8th Cir. 1973), *cert. denied*, 416 U.S. 989 (1974); United States v. Beasley, 438 F.2d 1279, 1281 (6th Cir.); *cert. denied*, 404 U.S. 666 (1971); Kay v. United States, 255 F.2d 476, 480–81 (4th Cir.), *cert. denied*, 358 U.S. 825 (1958); United States v. Ware, 247 F.2d 698, 699–700 (7th Cir. 1957); State v. Cosgrove, 181 Conn. 562, 562–85, 436 A.2d 33, 37–44 (1980); Howard v. United States, 473 A.2d 835, 838–40 (D.C. 1984); Commonwealth v. Harvard, 356 Mass. 452, 462–63, 253 N.E.2d 346, 352 (1969); State v. Larochelle, 112 N.H. 392, 394–97, 297 A.2d 223, 225–26 (1972); State v. Malsbury, 186 N.J. Super. 91, 98–101, 451 A.2d 421, 425–26 (1982); State v. Smith, 312 N.C. 361, 364–86, 323 S.E.2d 316, 318–30 (1984); Coulter v. State, 494 S.W.2d 876, 881–884 (Tex. Crim. App. 1973); State v. Kreck, 86 Wash.2d 112, 117–21 & n.3, 542 P.2d 782, 786–88 & n.3 (1975).

[71] *Kay*, 255 F.2d at 481. *Compare Broadnax*, 23 M.J. at 396 (Cox, J., concurring).

[72] *Beasley*, 438 F.2d at 1281.

The Second Circuit, however, prohibits admission of a lab report without the chemist's testimony, as do some states.[73] In *United States v. Oates*, the court held a lab report not admissible under Fed. R. Evid. 803(b), and probably inadmissible under the confrontation clause.[74]

Judge Cox, in his concurring opinion in *Broadnax*, provided the constitutional analysis that surely will satisfy the justices on the issue of chemical analysis. He first recites the sixth amendment requirements to admit hearsay: 1) an unavailable declarant; and 2) "the evidence bears such 'indicia of reliability' as to be a veritable substitute for the preferred face-to-face confrontation."[75] Judge Cox then recounts that for chemists' reports only, the chemist's unavailability need not be proved in the military because: (1) chemical identification is "essentially neutral and nonaccusatory;" (2) the analytical process is objective, not subjective; (3) defendants' objections to the chemists' absence are "tactical ploys" usually "designed to capitalize on the practical impediments to routinely providing chemist-witnesses throughout the world wide court-martial jurisdiction;" and (4) defendants may always demand and obtain the chemist's presence under the compulsory process clause.[76]

The Supreme Court should have no problem with allowing the chemist's report to join the public record and business record as evidence properly received into evidence without the author testifying.[77] Such records have received the Court's approval as "firmly rooted" hearsay exceptions, and can be admitted without even a custodian's testimony if they are self-authenticating.[78] Chemists' reports, along with public records and business records, are accurate and reliable because they are routinely prepared by persons who have no motive to falsify the reports, and no known suspect to implicate.[79]

Turning to all other scientific reports, trial counsel should produce the examiner in all areas that involve subjective, evaluative analysis. Not only is this sound advocacy, it ensures confrontation of adverse witnesses, which the *Broadnax* rule fails to accomplish. *Broadnax* allows trial counsel to notify the accused prior to trial of the expert witness report, and then to assert defense waiver if a defense counsel does not demand that the witness be called to testify.[80] This rule is less tenable than the chemist rule. First, this process shifts the burden of proof to the accused by forcing the accused to call an adverse and incriminating witness.

Second, this process had no support in federal decisional law. The Federal Circuit courts in *Parker*,[81] *Beasley*,[82] and *Kay*,[83] have each stressed the objective fact finding process of the chemist. Subjective opinions and analysis of handwriting,[84] fingerprints, sanity,[85] fibers, bodily fluids, and the probability of identification all must be subjected to the rigors of cross-examination in order to accord the accused his right to confrontation.

In the end, prosecutors are paid for their judgment. From charging the accused, to selecting witnesses, to presenting evidence, the trial counsel must decide where and how to spend the command's funds to achieve a just conviction. Depriving the court members the often dramatic testimony of a scientist, an expert witness, in subjective analysis cases, seems to be a poor decision that begs for reversal by the Supreme Court.

Dramatic Reforms—Have We Forgotten?

When Justice Thurgood Marshall was a defense attorney, there were no motion hearings and no bench trials in

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[73] United States v. Oates, 560 F.2d 45, 80–81 (2d Cir. 1977); Moon v. State, 300 Md. 354, 369–71, 478 A.2d 695, 703 (1984) (sixth amendment forbids admission of report which had discrepancies on its face), *cert. denied*, 469 U.S. 1207 (1985); Commonwealth v. McCloud, 457 Pa. 310, 322 A.2d 653 (1974) (state constitution forbids medical examiners report on cause of death); State v. Henderson, 554 S.W.2d 117 (Tenn. 1977).

[74] *Oates*, 560 F.2d at 80–81.

[75] *Broadnax*, 23 M.J. at 396 (Cox, J., concurring) (citing United States v. Hines, 23 M.J. 125, 130, 136, 137 (C.M.A. 1986). *See generally* Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[76] *Broadnax*, 23 M.J. at 396 (Cox, J., concurring). *See* UCMJ art. 46; R.C.M. 703(a) ("The prosecution and defense and the court-martial shall have equal opportunity to obtain witnesses and evidence, including the benefit of compulsory process."). Failure to subpoena the author of contested exhibits is noted by reviewing courts, and considered against the defendant in determining whether his sixth amendment confrontation right was denied. *See* Barber v. Page, 390 U.S. 719 (1968); *Dutton*, 460 U.S. at 88 n.19, 96 n.3; United States v. Lee, 589 F.2d 980 (9th Cir. 1979); Holbrook v. United States, 441 F.2d 371, 373 (6th Cir. 1971).

[77] " 'Properly administered the business and public records exceptions would seem to be among the safest of the hearsay exceptions.' " *Roberts*, 448 U.S. at 66 n.8 (citations omitted); Dutton v. Evans, 400 U.S. 74, 87–89, 95–96 (1970) (plurality opinion and Harlan, J., concurring in the result).

[78] *Id.*; Mil. R. Evid. 803(6) and (8), 902 (self-authentication).

[79] *See, e.g.*, E. Cleary, McCormick's Handbook of the Law of Evidence § 306, at 720 (2d ed. 1972); 4 D. Louisell & C. Mueler, Federal Evidence § 446, at 646–47 (1980); 4 J. Weinstein & M. Berger, Weinstein's Evidence 803(6) [01], at 803–176 (1985). In fact, such records are often more reliable then the author's testimony given the large number of records and entries he has made; cross-examination of such authors is often not helpful; it is practically inconvenient to call all the witnesses who recorded entries on one record; and public expediency is not served by having public officials always present in trials to testify; thus, unavailability of the author need not be proved. E. Cleary, *supra*, § 312, at 729, § 315 at 736; 4 D. Louisell & C. Mueller, *supra*, § 446 at 646; 4 J. Weinstein & M. Berger, *supra*, 803(6) [01], at 803–149, 803(8) [01], at 803–189–90; 5 J. Wigmore, Evidence in Trials at Common Law § 1521 at 440, § 1631 at 617–18 (Chadbourne rev. 1974).

[80] *Broadnax*, 23 M.J. at 394.

[81] *Parker*, 491 F.2d at 520–21.

[82] *Beasley*, 438 F.2d at 1281.

[83] *Kay*, 255 F.2d at 481.

[84] *See Broadnax*, 23 M.J. at 389, 397.

[85] Phillips v. Neil, 452 F.2d 337, 347–49 (6th Cir. 1971) (admission of medical record containing psychiatric opinion on defendant's mental condition violated the defendant's right to confrontation), *cert. denied*, 409 U.S. 884 (1972).

courts-martial.[86] The following survey will illustrate the sweeping changes in the military system, and the reservations that some justices still have about the system. The dissenting justices in *Solorio* believe the military system deliberately withholds constitutional protections from soldiers, is permeated with unlawful command influence, and needs immediate reform by Congress.[87] Indeed the majority in *Solorio* refused to endorse the military system even with its recent reforms.[88]

Only recently has the military justice system begun to shed its star-chamber image, and its practitioners must cite these positive reforms at every opportunity in order to purge that image from the public's collective mind.

Commentators have agreed that the Military Justice Act of 1968 provided major reform so that "military justice attained virtual parity with civilian criminal justice."[89] For example, the 1968 Act mandated that qualified defense attorneys represent soldiers not only at general courts-martial, but also at BCD special courts-martial and all special courts-martial unless unavailable because of military conditions.[90] The services have ensured by regulation that the accused is represented at all special courts-martial.[91] Further, the Army and Air Force have an independent trial defense service,[92] and the Coast Guard provides the accused, upon request, an independent defense counsel from another command.[93] Navy defense counsel are no longer in the post commander's chain of command, and Marine Corps defense counsel are evaluated by independent regional defense counsel.[94]

In 1968 Congress also abolished the mysterious position of "law officer," and created the independent "military judge" with enhanced power and prestige.[95] The services further strengthened the role of the military judge by requiring one be assigned to *all* special courts-martial, although not required by the Act.[96] For the first time a soldier could elect a trial by the military judge, and the judge could order the withdrawal of a guilty plea "prior to announcement of the sentence."[97] Finally, the military judge was empowered to hear and decide pretrial motions, and other motions outside the presence of the court-members.[98]

The 1968 Act also created "Courts of Military Review" which replaced the Boards of Review, and provided for the complete independence in performance evaluations for, and promotion of, judges on the Courts of Review.[99] Congress also attacked unlawful command influence by amending article 37 to prohibit the inclusion of any comment whatsoever on the execution of duty as a court member or defense counsel in any report affecting performance evaluation or promotion.[100]

Finally, service members gained individual rights in 1968 such as the absolute right to refuse trial by summary court-martial, and to demand trial by special or general court-martial with their attendant procedural rights.[101] Bail pending appeal was also added in the form of deferral of punishment.[102] While not enacted through Congress, the President provided greater procedural rights to service members through the Manual for Courts Martial issued in 1969. For example, pretrial discovery in the military is far broader than that required in the federal courts.[103] In 1980 the President prescribed the Military Rules of Evidence for Courts-Martial which were adapted from the Federal Rules of Evidence.[104]

In 1981 Congress resumed its reform of the system by reaffirming a service member's right to a certified defense

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[86] "Marshall's long experience as a defense lawyer left him suspicious of prosecutive and judicial practices that lent themselves to abuses of the rights of the accused, yet might not be easily susceptible of meaningful appellate review." IV L. Friedman & F. Israel, The Justices of the United States Supreme Court 1789–1969, 3063, 3079 (1969). Marshall began his practice in 1933; joined the NAACP Legal Defense Fund in 1936, was appointed to the Second Circuit Court of Appeals in 1961; became Solicitor General of the United States in July of 1965; and was confirmed as an Associate Justice of the Supreme Court in 1967. *Id.* at 3066, 3077, 3083, 3088. Marshall argued the military case of United States v. Adams, 319 U.S. 312 (1943) before the Supreme Court for the Legal Defense Fund, and was on the brief for the Legal Defense Fund in the military case of Burns v. Wilson, 346 U.S. 317 (1953). *Id.* at 3090.

[87] *See supra* notes 8–9. *See also* Gilligan, *supra* note 23, at 3 (public still does not understand military justice).

[88] *See supra* notes 7–8 and accompanying text.

[89] Irwin, *The Military Justice Act of 1968*, 45 Mil. L. Rev. 77 (1969). *See generally* Mounts & Sugarman, *The Military Justice Act of 1968*, 55 A.B.A.J. 470 (1968); Moyer, *Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant*, 22 Me. L. Rev. 1 (1970); Bishop, *Perspective: The Case for Military Justice*, 62 Mil. L. Rev. 215 (1973); Poydasheff & Satter, *Military Justice?—Definitely!*, 49 Tul. L. Rev. 588 (1975); Pitkin, *The Military Justice System: An Analysis from the Defendant's Perspective*, 29 Navy JAG J. 251 (1977); Zimmerman, *Civilian v. Military Justice, The Comparison of Defendant's Rights*, 17 Trial 34 (1981).

[90] Pub. L. No. 90–632, § 2(5) and (10), 82 Stat. 1335 and 1337; UCMJ arts. 27(c) and 19. *See also* S. Rep. No. 1601, 90th Cong., 2d Sess. 8 (1968) (Senate makes clear that counsel will be provided in all but the most unusual cases).

[91] *E.g.*, AR 27–10, para. 5–5; Air Force Reg. 111–1, Military Justice, Military Justice Guide, para. 3–6 (1 Aug. 1984) [hereinafter AFR 111–1].

[92] *E.g.*, AR 27–10, Ch. 6 (Army's Trial Defense Service).

[93] Dep't of Transportation, Coast Guard, Military Justice Manual, COMDTINST M5810.1A, § 302–2 (Apr. 10, 1985) [hereinafter COMDTINST].

[94] Dep't of Navy, Manual of the Judge Advocate General, § 0100–0104, 041(a)–(c) (C5, May 26, 1986) [hereinafter JAGMAN]; Marine Corps Order 58.11A (Nov. 15, 1985).

[95] Pub. L. No. 90–632, § 2(9) and (3), 82 Stat. 1336, and 1335; UCMJ arts. 26 and 16.

[96] AR 27–10, para 5–3; AFR 111–1, para 3–8; JAGMAN § 5800.7B, § 301–10A; COMDTINST § 300–1.

[97] Pub. L. No. 90–632, § 2(3) and (19)(B), 82 Stat. 1335 and 1339; UCMJ arts. 16 and 45(b).

[98] Pub. L. No. 90–632, § 2(15)(a), 82 Stat. 1338; UCMJ art. 39(a). *See also* S. Rep. No. 1601, 90th Cong., 2d Sess. (1968).

[99] Pub. L. No. 90–632, § 2(27), 82 Stat. 1341; UCMJ art. 66(a), (g) and (h).

[100] Pub. L. No. 90–632, § 2(13)(b), 82 Stat. 1338; UCMJ art. 37(b).

[101] Pub. L. No. 90–632, § 2(6), 82 Stat. 1336, UCMJ art. 20.

[102] Pub. L. No. 90–632, § 2(24)(b) and (d), 82 Stat. 1341, UCMJ art. 57(d).

[103] *Compare* Manual for Courts-Martial, United States, 1969 (Rev. ed.), para 115(c), R.C.M. 701, and Mil. R. Evid. 304, 311 and 321, *with* Rule 16, *Fed. R. Crim. P.*

[104] Exec. Order No. 12198, 3 C.F.R. 151 (1980). *See* S. Saltzburg, L. Schinasi, D. Schlueter, Military Rules of Evidence Manual (1981).

counsel before an investigation under article 32 of the Code.[105] A soldier's right to an article 32 investigation has been recognized by the civilian community as one of the military accused's most important rights because it provides open discovery and cross-examination of witnesses (adverse and friendly) under oath.[106]

The year 1983 brought further major reforms: Supreme Court review of the Court of Military Appeals decisions, government appeals, waiver of appeals, a specific punitive article for drug offenses, and increased membership on the Code Committee.[107] Important issues remained and Congress ordered an Advisory Commission to study them. The Commission recommended, *inter alia*, that court members continue to sentence soldiers, that the jurisdiction of special courts-martial be extended, that military judges not receive guaranteed tenure, and that the Court of Military Appeals be an Article III court with five members.[108]

After the 1983 Act the President made additional reforms through his 1984 Manual. The Manual now sets forth procedures for apprehensions in private dwellings, pretrial confinement with counsel rights, plea agreements, speedy trial rights similar to the federal system, and imposition of the death penalty.[109]

Finally, trial counsel are reminded to publicize these reforms at every opportunity. As long as the public remains ignorant of the military system,[110] the Supreme Court will scrutinize even the most routine case like *Goodson*; three of the justices believe the military system still deliberately withholds constitutional rights from soldiers.[111] Practitioners must constantly stress the system's benefits.

Conclusion

Every court-martial presents constitutional issues like court size, joinder, and scientific evidence. Other issues abound. Every court-martial will be reviewed by appellate attorneys seeking Supreme Court review.[112] The litigants, the press, the ACLU, and other *amici curiae* will lobby the Court to reform the military system through that particular case. From the *Solorio* decision we learn that some justices still believe reform is needed.

One conclusion is manifest: constitutional issues will be raised at trial and litigated on appeal. Trial counsel should resolve those issues on the record while making a complete record of fact and law. Further, the system's reforms should be emphasized. While we have come far since 1949, we have miles to go before we sleep.

[105] Military Justice Amendments of 1981, Pub. L. No. 97–81, §§ 1–6, 95 Stat. 1085–89, UCMJ arts. 32 and 38.

[106] Gosa v. Mayden, 413 U.S. 665, 681 n.6 (1973); *Moyer, supra* note 89, at 6–11; Sandell, *The Grand Jury and the Article 32: A Comparison*, 1 N. Ky. St. L.F. 25 (1973). *Also* Swanson, *The Article 32 Right of An Accused to Pre-Trial Cross-Examination of the Witness Against Him "If They are Available"*, 24 Air Force L. Rev. 246, 249, 253 (1984).

[107] Military Justice Act of 1983, Pub. L. No. 98–209, §§ 10, 5(c)(1), 5(b)(1), 8, 9, 97 Stat. 1393, 1405, 1398, 1397, 1403, 1405, UCMJ arts. 67, 62, 61, 112a, 67. *See generally* Cook, *Highlights of the Military Justice Act of 1983*, The Army Lawyer, Feb. 1984, at 40.

[108] Pub. L. No. 98–209, § 9(b), 97 Stat. 1405; Military Justice Act of 1983 Advisory Commission Report (1984). *See generally* Lonegran, *An Overview of the Military Justice Act of 1983 Advisory Commission Report*, The Army Lawyer, May 1985, at 35.

[109] R.C.M. 302, 305, 705, 707 and 1004.

[110] Gilligan, *supra* note 23, at 3 n. 4–6.

[111] *Solorio*, 107 S. Ct. at 2941 (Justices Marshall, Brennan and Blackman, dissenting).

[112] The Examination and New Trials Division in USALSA reviews the records of all special courts-martial, and the records of special and general courts-martial not reviewed by the Courts of Military Review. UCMJ art. 64. The Courts of Review automatically review all courts-martial in which a punitive discharge or one year of confinement is adjudged. UCMJ arts. 66–67.

Trial Defense Service Note

The Commander's Role in Ordering Urinalysis Testing

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The Army conducts hundreds of thousands of urinalysis tests annually.[1] Every "positive" test result has the potential of becoming a contested piece of evidence in a court-martial. Whether a "positive" result on a urinalysis test will be admitted into evidence often hinges on whether the test was performed in compliance with Army regulations and the applicable Military Rules of Evidence. Frequently, the issues of *who ordered* a particular urinalysis test and *under what authority* they did so become crucial in determining the admissibility of the test results. Under Army Regulation 600–85, only a commander, a physician, or an alcohol and drug control officer may order urinalysis testing of soldiers.[2] This article examines the role of the commander under the regulation (Army Regulation 600–85) and under

[1] Telephone Conversation of 3 May 1988 with MAJ Puttock of the US Army Drug and Alcohol Agency (a subunit of the Total Army Personnel Agency (TAPA)). Currently, approximately 750,000 urinalysis tests are being conducted annually.

[2] Army Reg. 600–85, Alcohol and Drug Abuse Prevention and Control Program, para. 10–3a (3 Nov. 1986) [hereinafter AR 600–85].

the Military Rules of Evidence, particularly Military Rule of Evidence 313.[3]

Under the Regulation

The principal players under the regulation are the commander, the unit alcohol and drug coordinator (UADC), and the observer. The commander orders the testing, the UADC administers the testing, and the observer ensures that the urine collected is that of the soldier providing the sample. Army Regulation 600–20 delineates what is required to be considered a "commander."[4] The appointment criteria to be a UADC are that the soldier be in the grade of E–5 or above and that he or she be mature, skillful and honest.[5] Observers must be soldiers in the grade of E–5 or higher who have sufficient maturity and integrity.[6] When all of these individuals properly perform their duties, a urinalysis test conducted at the unit level should be valid.[7]

A close examination of the commander's role in the testing program often reveals a critical irregularity—the abdication by the commander of his or her responsibility to order the testing. The regulation states that "[t]he decision to test is a command judgment."[8] Sometimes, however, a commander will delegate this judgment to a subordinate. It is not unusual to find the first sergeant, an executive officer, or even the UADC, deciding who is to be tested, and when and where the test is to be conducted. Too often, the commander is as surprised as his or her soldiers to find urinalysis testing being conducted.

Army Regulation 600–85 does not discuss the delegation of the commander's responsibility to order testing. The explanatory text in the subparagraphs of the enabling paragraph, however, specifically references Military Rules of Evidence 312, 313, 314, 315, and 316.[9] Each of these Military Rules of Evidence, which deal with intrusions, inspections or searches, requires some type of specific command authority or command direction. A commander's order, not a subordinate's, is normally required to uphold the validity of those types of intrusive actions in court. One can argue, therefore, that the same is true with regard to urinalysis testing and that the decision to test may not be delegated.

A more cogent reason supporting nondelegability of the authority to order testing is the privacy interest of the soldier being tested. Citizens who enter the United States Army as soldiers do not lose all of their rights to privacy. Army Regulation 600–85 specifically recognizes this privacy interest. It states, "[s]oldiers. . . .will be accorded maximum respect and concern for human dignity as much as possible under the particular circumstances."[10] Soldiers do not want to be viewed in a private act such as urination. They certainly do not wish to do so upon the order of a sergeant/E–5 UADC. The possibility of abuse in such a situation is readily apparent. Paragraph 10–3a of Army Regulation 600–85 allows a commander to test his entire unit or a part of it.[11] Many units test on a biweekly or on a monthly basis, testing only part of the unit at any one time. A subordinate, if left to his or her own discretion, could use the urinalysis testing program to abuse some soldiers while favoring others. A commander, generally endowed with more mature judgment, breadth of experience, and impartiality, should personally ensure that the urinalysis testing program is fairly instituted and is not overboard or overreaching. The regulation implicitly prescribes this active role by the commander, and common sense demands it.

Military courts have not ruled specifically on the status of a soldier's privacy interests in urinalysis testing under Army Regulation 600–85. They have established, however, that the military must follow its own regulations, especially those regulations that provide some type of privacy interest. In *United States v. Russo* the Court of Military Appeals reestablished the principle that "[i]t is well settled that a government agency must abide by its own rules and regulations where the underlying purpose of such regulations is the protection of personal liberties or interests."[12] Surely, exposing one's genitals while urinating is a privacy interest recognized by Army Regulation 600–85.[13]

Under the Military Rules of Evidence

Before the adoption of the 1984 Manual for Courts-Martial the legal basis for urinalysis testing was purported to be Military Rule of Evidence 314(k).[14] In the 1983 case of *Murray v. Haldeman*[15] the Court of Military Appeals used Military Rule of Evidence 314(k) to allow random, nonprobable cause, urine testing. Some commentators have argued that the holding of *Murray v. Haldeman* is no

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[3] *See* Manual for Courts-Martial, United States, 1984, Mil R. Evid. 312, 313, 314, 315 and 316 [hereinafter Mil. R. Evid. 312, 313, 314, 315, 316].

[4] Army Reg. 600–20, Army Command Policy and Procedures, Chapter 2 (30 Mar. 1988) [hereinafter AR 600–20].

[5] *See* AR 600–85, para. 10–4e(1).

[6] *See* AR 600–85, para. 10–4e(2).

[7] The roles of the UADC and the observer are set forth in great detail in Appendix E of AR 600–85. Their performance is normally closely scrutinized by the defense counsel. For a defense oriented perspective on the roles of the UADC and the observer, see J. Impallaria, *An Outline Approach to Defending Urinalysis Cases*, The Army Lawyer, May 1988 at 27.

[8] AR 600–85, para. 10–3a.

[9] *See* AR 600–85, para. 10–3a(1), (2), (3), and (4).

[10] AR 600–85, para. 10–3a.

[11] Aviators, Military Police, and those soldiers under the Personnel Reliability Program are required by AR 600–85, para. 10–3a(4) to be tested at least once a year. There is no regulatory mandate to conduct urinalysis testing of other categories of soldiers at any particular time period, although most local commands put forth suggested "goals", e.g. at least once every 6 months for all soldiers.

[12] United States v. Russo, 1 M.J. 134 (C.M.A. 1975) (citation omitted).

[13] Neither paragraph 1–1 (Purpose) nor paragraph 1–9 (General Policy) or AR 600–85 specifically mentions a privacy interest of soldiers. A privacy interest may be inferred, however, by the second and fifth sentences of paragraph 10–3a and by the common human experience of hiding one's body when urinating.

[14] "Other searches. A search of a type not otherwise included in this rule and not requiring probable cause under rule 315 may be conducted when permissible under the Constitution of the United States as applied to members of the armed forces." Mil. R. Evid. 314(k).

[15] Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

longer applicable, as the 1984 Manual for Court-Martial now specifically allows for urine sampling in Military Rule of Evidence 313(b).[16] The appellate courts are now using Military Rule of Evidence 313(b) in their recent (post 1984) analyses of command directed urinalysis testing. *Murray v. Haldeman* can be viewed either as the basis of the new Military Rule of Evidence 313, or as an invalid bit of old case law.[17]

The reported cases that have examined the role of the commander in urinalysis testing under Military Rule of Evidence 313(b) are primarily from the Courts of Military Review. In *United States v. Heupel*[18] the military judge ruled that the results of a urinalysis test, conducted under the direction of a noncommissioned officer in charge (NCOIC) of an Air Force correctional confinement facility (CCF), were inadmissible under Military Rule of Evidence 313(b). The NCOIC had implemented a testing program in which all airmen entering the facility for correction would have to provide a urine sample. He had received contingent approval from the base commander for such testing. The contingencies were obtaining the approval of the staff judge advocate, and receiving urinalysis allocations from the wing vice commander. It is unclear from the recited facts whether or not the NCOIC did receive either the allocations or the approval of the staff judge advocate. Samples were taken, however, and the test was labeled "command directed." Airman Conterras was tested upon his entry into the CCF. He tested "positive." On these facts, the military judge ruled the test results inadmissible under three bases: 1) under provisions of Air Force Regulation 30–2 and its amendment, Interim Message Change 82–3; 2) under Military Rule of Evidence 313(b)(1); and 3) under Military Rule of Evidence 313(b)(2). The military judge's rulings of inadmissibility, except for that under Military Rule of Evidence 313(b)(1), were affirmed by the Court of Military Review. Of particular note is the appellate court's agreement that Airman Conterras was "specifically selected" in violation of Military Rule of Evidence 313(b)(2).

The term "specific individuals selected for examination" found in Military Rule of Evidence 313(b)(2) was intended to preclude examinations that are subterfuges for searches. This rationale goes hand-in-hand with the requirement that a commander direct urinalysis testing. The term "specific individuals," according to the drafters, means persons named or identified on the basis of individual characteristics.[19] A soldier who is not a commander probably would have a greater tendency to select, for urinalysis testing, those soldiers whom he or she suspects of drug use. Individual characteristics could become paramount. Command control of searches, inspections, and seizures ensures the evenhandedness of the military justice system. Allowing a solider who is not a commander to decide such issues would put too much discretion in the hands of the person actually conducting the examination. A subordinate with too much discretion conducting the examination can be unlawful.[20]

A small amount of subordinate discretion, however, was recently approved by the Court of Military Appeals. In *United States v. Johnston*[21] the court upheld a urinalysis testing program that had been mandated through the instructions of a higher headquarters. There, the staff of a brig was to be tested monthly with the test date to be randomly selected. A law enforcement petty officer, using his own discretion, decided on the monthly testing date but had no control over who would be tested. The day picked had to be approved by his supervisor. Unlike the NCOIC of the CCF, he could not "specifically select" any individual or group of individuals, because the instructions mandated that everyone was to be tested.

In the more recent case of *United States v. Burris*[22] a different panel of the Air Force Court of Military Review upheld the validity of another "command directed" urinalysis test. The court noted that Military Rule of Evidence 313(b) limits the authority to conduct inspections solely to commanders. In this case a squadron commander ordered his acting first sergeant to make the necessary arrangements for a random urinalysis testing. The first sergeant did so, and after coordination, selected a certain date and a method of random selection. Later, the first sergeant informed the commander of the date. The Court of Military Review affirmed this method of a "command directed" urinalysis test.

Military Rule of Evidence 313(b) defines "inspection" as an "incident of command."[23] The courts have been reluctant to give soldiers other than commanders the authority to authorize inspections on their own accord.[24] Why the difference between the three cases? The answer appears to be that the commander in *Heupel* had no idea of the specifics of the testing program other than the general knowledge that it was happening. In *Johnston* the testing program was specifically mandated by higher headquarters in written instructions, with little room for discretion. In *Burris* the commander personally ordered the testing and was later made aware of the exact date and of the method of selection. In *Burris* and *Johnston* the command was involved

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[16] *See e.g.*, Saltzburg, Schinasi, and Schlueter, Military Rules of Evidence Manual at 235 (2d ed. 1986); Mil. R. Evid. 313 states in pertinent part that, "an order to produce body fluids, such as urine, is permissible in accordance with this rule."

[17] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. analysis, app. 22, at A22–22 [hereinafter Mil. R. Evid. analysis]. Murray v. Haldeman is cited as a source. Murray v. Haldeman has been cited by the Court of Military Appeals since the 1984 adaption of Mil. R. Evid. 313. *See e.g.*, United States v. Johnston, 24 M.J. 271 (C.M.A. 1987). The court's analysis, however, is under Mil. R. Evid. 313(b) rather than 314(k).

[18] United States v. Heupel, 21 M.J. 589 (A.F.C.M.R. 1985).

[19] Mil. R. Evid. analysis at A22–23.

[20] *See* United States v. Harris, 5 M.J. 44 (C.M.A. 1978).

[21] United States v. Johnston, 24 M.J. 271 (C.M.A. 1987).

[22] United States v. Burris, 25 M.J. 846 (A.F.C.M.R. 1988).

[23] Mil. R. Evid. 313(b).

[24] *See e.g.*, United States v. Ellis, 24 M.J. 370 (C.M.A. 1987) in which the Court very specifically mentions, in its analysis of Mil. R. Evid. 313, the underlying commander's order. *See also* U.S. v. Harris, 5 M.J. 44 (C.M.A. 1987)—question of too much discretion in the law enforcement officer. On the other hand, the drafters of the Military Rules of Evidence in their analysis of Mil. R. Evid. 313 note that "any individual placed in a command or appropriate supervisory position may inspect the personnel and property within his or her control". Mil. R. Evid. analysis at A22–21.

and ensured that what was taking place was a valid inspection. In *Heupel* the command was, at best, peripherally aware of what the NCOIC was doing.

This analysis follows an Army Court of Military Review's related holding that command directed urinalysis testing (inspections) are valid if they are directed at preset, scheduled times. In *United States v. Valenzuela*[25] an Army Court of Military Review upheld a commander's directive to test soldiers immediately upon their return from leave. It was established that the commander knew specifics of the testing program, and had personally ordered the initiation of the testing program. In the cases cited that upheld the inspections, a commander had personally and affirmatively ordered the testing either orally or in writing. Therefore, it appears that under Military Rule of Evidence 313(b), a commander's establishment of a detailed testing scheme through a written directive or a personal order may be a prerequisite for a valid urinalysis test.

Conclusion

Attorneys defending soldiers in urinalysis cases should ascertain who ordered the urinalysis test and under what authority he or she did so. Perhaps a commander was not sufficiently involved in the decision to conduct that particular test. There are some command responsibilities that may not be delegated, at least not beyond certain limits. The regulation and Military Rule of Evidence indicate that the decision to order urinalysis testing may be one of them. Personal command involvement is a necessary prerequisite for a valid test. Admissibility of the "positive" test result is dependent on the actions, or the inactions, of the appropriate commander.

Clerk of Court Notes

Court-Martial Processing Times

The table below shows the Armywide average processing times for general courts-martial and bad-conduct discharge special courts-martial for third quarter of Fiscal Year 1988. Previously published first and second quarter figures are shown for comparison.

General Courts-Martial

	1st Qtr	2d Qtr	3d Qtr
Records received by Clerk of Court	405	404	404
Days from charging or restraint to sentence	45	50	46
Days from sentence to action	48	50	46
Days from action to dispatch	5	4	4
Days from dispatch to receipt by the Clerk	9	8	7

BCD Special Courts-Martial

Records received by Clerk of Court	168	168	133
Days from charging or restraint to sentence	34	34	28
Days from sentence to action	52	44	46
Days from action to dispatch	5	4	4
Days from dispatch to receipt by the Clerk	10	7	7

U.S. Army Court of Military Review Caseload, FY 1986–1988

	FY 1986	FY 1987	FY 1988
New Records Received	2,181	1,972 (−9.6%)	1,963 (−0.5%)
Cases Filed at Issue	2,321	2,143 (−7.7%)	2.068 (−3.5%)
Decisions Issued	2,643	2,119 (−19.8%)	1,968 (−7.1%)
Published Opinions	131 (5.0%)	92 (4.3%)	136 (6.9%)
Memo Opinions	539 (20.4%)	357 (16.8%)	314 (15.9%)
Short Form/ Orders	1,973 (74.6%)	1,670 (78.8%)	1,518 (77.1%)

Court-Martial and Nonjudicial Punishment Rates Per Thousand

Third Quarter Year 1988; April–June 1988

	Army-Wide		CONUS		Europe		Pacific		Other	
GCM	0.59	(2.35)	0.50	(2.01)	0.85	(3.39)	0.49	(1.95)	0.52	(2.09)
BCDSPCM	0.28	(1.13)	0.26	(1.04)	0.40	(1.62)	0.07	(0.29)	0.37	(1.49)
SPCM	0.05	(0.20)	0.06	(0.24)	0.04	(0.17)	0.02	(0.07)	0.00	(0.00)
SCM	0.51	(2.05)	0.49	(1.97)	0.58	(2.30)	0.60	(2.38)	0.60	(2.39)
NJP	30.18	(120.74)	32.51	(130.05)	27.45	(109.81)	30.40	(121.59)	52.57	(210.29)

Note: Figures in parentheses are the annualized rates per thousand.

[25] United States v. Valenzuela, 24 M.J. 934 (A.C.M.R. 1987).

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Larceny of a Debt: *United States v. Mervine* Revisited

In *United States v. Mervine*,[1] the Court of Military Appeals held that a debt or the amount thereof is not the proper subject of a larceny.[2] In so doing, the court reversed the decision of the court of review, which impliedly held that a valid debt was a form of money and thus the proper subject of a larceny offense.[3] The Court of Military Appeals decision, however, does not answer the question of whether the accused's misconduct constituted a larceny in violation of article 121 under some other, uncharged theory.

The accused in *Mervine* purchased a variety of electronic equipment from the Navy Exchange in Naples, Italy.[4] The purchases were made under a deferred payment plan, in which the accused agreed to pay $900.00 in several monthly installments.[5] The accused was later transferred to Diego Garcia, where he received numerous notices from the Exchange concerning overdue payments that he had failed to make.[6]

In response, the accused devised a plan to deceive the Exchange into believing that he had already paid the entire amount of the debt, which then totaled over $950.00.[7] The accused acquired a Postal Money Order receipt from a former supervisor and altered it to reflect his own name and account number, the appropriate date, and the amount owed.[8] The accused then sent the altered receipt to the Exchange, along with an explanatory letter from himself and a letter from his commanding officer stating that the debt had been paid and the Exchange must have lost or misplaced the pertinent records.[9] The Exchange detected the forgeries and notified law enforcement authorities.[10]

The accused pled guilty to attempted larceny[11] of the money he owed to the Navy Exchange.[12] The court of review affirmed, holding that the accused's attempt to extinguish a valid debt by fraudulent means constituted an attempted larceny in the amount of the debt.[13] The court of review characterized the accused's debt as an account receivable, which it defined further as a form of money.[14] As money can clearly be the proper subject of a larceny,[15] the court of review found that the accused's misconduct fell within the broad ambit of article 121.

The Court of Military Appeals disagreed, finding that although an account receivable "states the amount of a debt in monetary terms, it is simply not the equivalent of money for purposes of Article 121."[16] The Court of Military Appeals concluded "that the holding of the court below to the contrary had the effect of broadening the scope of larceny beyond that intended by Congress."[17]

Despite the result in *Mervine*, the Court of Military Appeals reiterated the substantial breadth of larceny under article 121. The court observed that "[t]his Article proscribes larceny in its various forms, including obtaining property by false pretenses and embezzlement, and provides for a simplified pleading form to cover the different theories of theft."[18] The court cautioned, however, that the "combination of these offenses into a single statute . . . did not create any offense under the statute not previously recognized by common law as larceny, false pretenses, or embezzlement."[19]

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[1] 26 M.J. 482 (C.M.A. 1988).

[2] Uniform Code of Military Justice art. 121, 10 U.S.C. § 921 (1982) [hereinafter UCMJ].

[3] United States v. Mervine, 23 M.J. 801, 805 (N.M.C.M.R. 1986).

[4] *Mervine*, 26 M.J. at 482.

[5] *Id.*

[6] *Id.* at 482–83.

[7] *Id.* at 483.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] UCMJ art. 80.

[12] *Mervine*, 26 M.J. at 483. The government withdrew two related forgery specifications in light of the accused's pleas. *Id.*

[13] *Mervine*, 23 M.J. at 805.

[14] *Id.*

[15] UCMJ art. 121 defines larceny as "wrongfully tak[ing], obtain[ing], or withhold[ing], by any means, from the possession of the owner or of any other person *any money*, personal property, or article of value of any kind" (emphasis added).

[16] *Mervine*, 26 M.J. at 484.

[17] *Id.*

[18] *Id.* at 483 (citing Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess. 815, 1232 (1949)); *see also* United States v. Norris, 8 C.M.R. 36, 39 (C.M.A. 1953).

[19] *Mervine*, 26 M.J. at 483 (citing United States v. Buck, 12 C.M.R. 97, 99 (C.M.A. 1953)).

Embezzlement, recognized as early as the sixteenth century,[20] represents a legislative effort to fill an unreasonable gap in the developing law of larceny.[21] Under an embezzlement theory, one already in lawful possession of the property of another could be convicted where there was fraudulent conversion or withholding.[22] The Manual for Courts-Martial provides specifically that "a wrongful withholding with intent permanently to appropriate includes the offense formerly known as embezzlement."[23] The Manual provides further that "[a]lthough a person gets property by a taking or obtaining which was not wrongful or which was without a concurrent intent to steal, a larceny is nevertheless committed if an intent to steal is formed after the taking or obtaining and the property is wrongfully withheld with that intent."[24]

Thus, the question is raised—does the accused's misconduct in *Mervine* constitute a larceny or attempted larceny of the electronic equipment, under a wrongful withholding theory as recognized by article 121?

The starting point for analysis of this question is the Manual. In discussing the wrongful withholding theory, the Manual explains:

> [I]f a person rents another's vehicle, later decides to keep it permanently, and then fails to return it at the appointed time or uses it for a purpose not authorized by the terms of the rental, larceny has been committed, even though at the time the vehicle was rented, the person intended to return it after using it according to the agreement.[25]

The Court of Military Appeals long ago affirmed a larceny conviction under article 121 based upon this wrongful withholding theory. In *United States v. Amie*,[26] the accused received $80.00 from another soldier with the understanding that he would purchase a money order and forward it as partial payment for the other soldier's automobile.[27] The accused instead purchased a money order in the amount of $70.00, gave the other soldier an altered receipt showing that $80.00 had been forwarded, and retained $10.00 for himself.[28] The Court of Military Appeals affirmed the larceny conviction based upon the theory that the accused wrongfully retained the $10.00 provided to him by the other soldier.[29]

More recently, the Air Force Court of Military Review affirmed a larceny conviction under a wrongful withholding theory in *United States v. Moreno*.[30] The accused in *Moreno* discovered that $10,033.00 had been deposited mistakenly into his credit union account.[31] The accused then wrote two checks totalling $10,000.00,[32] and later denied knowing anything about the money.[33] Using a wrongful withholding theory, the court affirmed the accused's conviction for larceny of the $10,000.00.[34]

This same reasoning, it might be argued, can be applied to the electronic equipment acquired by the accused in *Mervine*. The argument would say that, just as with the other cases,[35] the accused's initially lawful possession of the equipment in *Mervine* became larcenous when he dishonestly withheld possession of it from the rightful owner. The argument would continue that the forged document used to effect the purported larceny in *Mervine* is similar in nature and purpose to the forged receipt made by the accused in *Amie*.[36]

The success of this theory would turn, however, on whether the Navy Exchange retained ownership of the equipment until the installment contract was paid in full. Put a slightly different way, the accused in *Mervine* could be guilty of wrongful withholding of the equipment only if title to the equipment had not already passed to him. In the Manual's rental car example,[37] for instance, the rental agency would clearly retain title to the car while the renter would acquire only a temporary right to use it. Thus, an action by the renter inconsistent with the car owner's property interest could amount to larceny by wrongful withholding. The owners of the money in *Moreno*[38] and *Amie*[39] likewise never surrendered ownership of the funds to the respective accuseds. Whether ownership of the item has passed to the credit purchaser is thus the crucial question, for as the Manual broadly indicates, "[a] debtor does not withhold specific property from the possession of a

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[20] 21 Hen. VIII, c.7 (1529).

[21] R. Perkins & R. Boyce, Criminal Law 351 (3d ed. 1982); W. LaFave & A. Scott, Handbook on Criminal Law 644 (1972).

[22] *See supra* note 21. Thus, a trespass was not required as is the case under common law larceny.

[23] Manual for Courts-Martial, United States, 1984, Part IV, para. 46c(1)(a) [hereinafter MCM, 1984].

[24] *Id.*, Part IV, para. 46c(1)(f)(i).

[25] *Id.*

[26] 22 C.M.R. 304 (C.M.A. 1957).

[27] *Id.* at 306.

[28] *Id.*

[29] *Id.* at 308.

[30] 23 M.J. 622 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 348 (C.M.A. 1987).

[31] *Id.* at 623.

[32] *Id.*

[33] *Id.* at 626.

[34] *Id.*

[35] *Amie*, C.M.R. at 306 ($10.00 to be used for a money order); *Moreno*, 23 M.J. at 623 ($10,000.00 mistakenly deposited in the accused's account and later withdrawn); MCM, 1984, Part IV, para. 46c(1)(f)(i) (rental car not returned as required).

[36] *Amie*, 22 C.M.R. at 306.

[37] MCM, 1984, Part IV, para. 46c(1)(f)(i).

[38] *Moreno*, 23 M.J. 622 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 348 (C.M.A. 1987).

[39] *Amie*, 22 C.M.R. 304 (C.M.A. 1957).

creditor by failing or refusing to pay a debt, for the relationship of a debtor and creditor does not give the creditor a possessory right in any specific money or other property of the debtor."[40]

How, then, can ownership of the equipment in *Mervine* be determined? One source might be by the statutory construction of any assimilated[41] state statute[42] or incorporated federal statute.[43] It might also be found by reference to the specific terms of the deferred payment plan at the Navy Exchange.[44] Construction of the statutory and contractual provisions should specify when title was transferred from the Navy Exchange to the accused—whether upon transfer of possession, upon final payment, or at some other time. This event would determine whether the accused wrongfully withheld the property of another, or instead attempted to fraudulently cancel a debt he owed on his own property.

Given the variety and complexity of the issue raised in *Mervine*, military prosecutors should consider a number of charging options, including alternative charging, to ensure that an accused's criminal conduct is properly described. Forgery,[45] dishonorably failing to pay a just debt,[46] and attempts to do both,[47] are all possibilities in these types of cases. Incorporation and assimilation of recently adopted federal and state law under article 134[48] should also be considered.[49] In response, defense counsel will have to analyze and attack potential flaws in the theory of prosecution, such as those identified by the Court of Military Appeals in *Mervine*. Defense counsel must require also that the prosecution has properly charged such misconduct, and that any variance between the method of charging and the proof advanced at trial is not prejudicial.[50] Notwithstanding the result in *Mervine*, counsel for both sides should be well-aware that a dishonest accused may be convicted and punished for his misconduct, even if he is not technically a thief under article 121 of the UCMJ. MAJ Milhizer.

Quick and the Confrontation Clause

In a two-page opinion with "punch," the Court of Military Appeals said "raise it or waive it" to defense counsel concerning an alleged sixth amendment confrontation clause violation. The court also upheld the government's decision not to call to the witness stand a 4 year-old victim who was available to testify.[51]

SPC Bobby Quick was convicted of committing lewd and lascivious acts and taking indecent liberties with his four-year-old daughter (J). According to Quick's pretrial statement, he was lying in bed with J one evening and "started getting curious about how she was developing."[52] Quick rubbed her vagina, and after he achieved an erection, had J kiss his penis.

The following afternoon J told her babysitter, Mrs. Lightfoot, that her "bottom hurt."[53] Upon questioning by Mrs. Lightfoot, J said that her daddy rubbed her with his fingers. Mrs. Lightfoot notices signs of irritation inside the labia of J's vagina.

Quick was apprehended and provided a detailed confession. J. testified at the article 32 investigation. At his general court-martial, Quick pled not guilty. Trial counsel introduced Quick's confession and called Mrs. Lightfoot as a witness, but decided not to call J because J was "responsive to leading questions only, answered those questions nonverbally, and required prompting from her mother before answering."[54] According to trial counsel, J's statements to Mrs. Lightfoot were more probative than her live testimony.

Defense counsel's motion *in liminie* to exclude J's statements to Mrs. Lightfoot under Mil. R. Evid. 803(24), the residual hearsay clause, was denied. A sixth amendment confrontation clause objection was not raised.

According to the Court of Military Appeals, "[i]t was expressly recognized at this court-martial that the alleged

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[40] MCM, 1984, Part IV, para. 46c(1)(b).

[41] Federal Assimilative Crimes Act, 18 U.S.C. § 13; *see* United States v. Wright, 5 M.J. 106 (C.M.A. 1978); United States v. Rowe, 32 C.M.R. 302 (C.M.A. 1962).

[42] *See* Lennon v. L.A.W. Acceptance Corp., 48 R.I. 363, 138 A. 215 (1927) (depending on the statute, the term owner might not include the holder of a conditional sales contract, inasmuch as the seller could give no valid consent to a third party to use the item); *see also* Rabaut v. Venable, 285 Mich. 111, 280 N.W. 129 (1938) (possession of a loaned vehicle for a few days is insufficient to make the possessor an owner within the statutory definition of the term).

[43] UCMJ art. 134, cl. 3; *see* MCM, 1984, Part IV, para. 60c(4)(b); *see, e.g.*, United States v. Mayo, 12 M.J. 286 (C.M.A. 1982). Questions as to the extraterritorial application of any incorporated or assimilated statutes would also arise in cases such as *Mervine*, where the misconduct at issue took place abroad. Such questions are beyond the scope of this note.

[44] Whether a deferred payment contract transfers ownership of merchandise to the purchaser concomitant with the transfer of possession, with the seller retaining a lien upon the merchandise, would be determined by applying Uniform Commercial Code principles to the specific contractual provisions. *See generally* U.C.C. Arts. 2 & 9 (1977). Commentators have noted, however, that the specific application of Article 9 principles to "certain secured transactions and certain sales" is not simple and "bristles with problems." J. White & R. Summers, Handbook on the Law Under the Uniform Commercial Code 754 (1972).

[45] UCMJ art. 123; *see* MCM, 1984, Part IV, para. 48.

[46] UCMJ art. 134; *see* MCM, 1984, Part IV, para 71.

[47] UCMJ art. 80; *see* MCM, 1984, Part IV, para. 4.

[48] UCMJ art. 134, cl. 3; *see supra* notes 41 and 43 and accompanying text.

[49] *See generally Mervine*, 26 M.J. at 486 n.4 (Everett, C.J., concurring) ("[m]ilitary prosecutors may also be able to deal with some new types of theft and commercial fraud by use of the third clause of Article 134 to incorporate relevant provisions of title 18, which has in recent years been amended from time to time to deal with new conditions").

[50] *See Mervine*, 26 M.J. at 484 (citing United States v. Wray, 17 M.J. 375 (C.M.A. 1984)).

[51] United States v. Quick, 26 M.J. 460 (C.M.A. 1988).

[52] *Id.* at 461.

[53] 26 M.J. at 461.

[54] *Id.* at 461.

victim could be called by defense and cross-examined as a hostile witness."[55] The Court of Military Appeals, however, was careful to distinguish *Quick* and a case decided by the United States Court of Appeals for the Eighth Circuit, *United States v. Cree.*[56]

In *Cree*, the burden of calling the government witness shifted to the defense when the government chose not to call the witness. In *Quick*, the court noted: "We distinguish appellant's case on the basis of the Government's actual offer to itself produce this witness, and we *further recommend* in future cases that the military judge particularly ascertain the parties' intentions in this regard" (emphasis added).[57]

In *Quick*, the government was allowed to avoid calling a very young victim to corroborate a confession when hearsay statements by the victim were admissible.[58] Two important facts avoided a confrontation clause violation: 1) defense counsel did not raise a sixth amendment objection; and 2) the government was prepared to call the victim if the defense had insisted. MAJ Merck.

The Military's Anomalous Kidnapping Laws

Prosecutorial discretion has traditionally involved the government's decision whether to try a suspect who has technically violated the law based upon a myriad of factual, legal, philosophical, and political considerations.[59] It has also involved a charging determination, considering issues such as punishment limitations and multiplicity.[60] The Army Court of Military Review recognized recently in *United States v. Jeffress*,[61] however, that an anomaly in the substantive military law of kidnapping[62] permits the government to take prosecutorial discretion a step further. As the decision in *Jeffress* indicates, the government can choose among three distinct sources for charging kidnapping. This apparently unique aspect of military law has several troubling implications.

The accused in *Jeffress* pled guilty to, among other charges, kidnapping and sodomy.[63] During the providence inquiry, the accused testified that he seized the victim and dragged her about fifteen feet where she fell to the ground and was sodomized by him.[64] The stipulation of fact and other evidence admitted at trial are consistent with the accused's statement that he dragged the victim only about fifteen feet.[65] This misconduct served as the basis for the kidnapping conviction.

The accused contended on appeal that this brief episode could not constitute kidnapping as a matter of law. In connection with this argument, the Army Court of Military Review recognized an emerging minority view which holds that "brief detentions or short movements 'which are incidents to other crimes and have long been treated as integral parts of other crimes' do not constitute kidnapping 'even though kidnapping might sometimes be spelled out literally from the statutory words.' "[66] The court noted that this approach, "commonly described as the modern view, has been embraced in many state jurisdictions."[67] This so-called modern view has been adopted in the Manual for Courts-Martial[68] and alluded to, in dicta, by the Court of Military Appeals.[69]

Federal law, on the other hand, follows the so-called traditional view of kidnapping, which encompasses a broad range of conduct where the victim is moved or held against his will.[70] Such a literal interpretation of the kidnapping statute, as noted by the court in *Jeffress*, "could sustain convictions for kidnapping where the detention and/or

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[55] 26 M.J. at 462.

[56] 778 F.2d 474 (8th Cir. 1985).

[57] 26 M.J. at 462 n.2.

[58] *Quick* is unique because of the reasons given for not calling the victim. Trial counsel did not claim emotional trauma or fear by the victim or any public policy consideration. Instead, the reasons related to the difficulties inherent to direct examination of a young child.

[59] *See generally* Uniform Code of Military Justice art. 34(a)(2), 10 U.S.C. § 834(a)(2) (1982) [hereinafter UCMJ]; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 306(b) discussion.

[60] *Id.*

[61] 26 M.J. 972 (A.C.M.R. 1988).

[62] *Id.* at 974 n.2.

[63] UCMJ arts. 134 and 125, respectively.

[64] *Jeffress*, 26 M.J. at 973.

[65] *Id.*

[66] *Id.* at 974 (quoting United States v. Charlton, 39 C.M.R. 141, 143 (C.M.A. 1969)), (citing People v. Levy, 15 N.Y.2d 159, 256, N.Y.S.2d 793, 204 N.E.2d 842 (1965)).

[67] *Jeffress*, 26 M.J. at 974 (citing State v. Frederico, 103 N.J. 169, 510 A.2d 1147 (1986)) (kidnapping may not be established by mere proof that the victim was moved incidental to an underlying offense); Seay v. State, 479 So.2d 1338 (Ala. Ct. App. 1985), *cert. denied*, 479 So.2d 1343 (Ala. 1985) (second-degree kidnapping requires substantial removal, isolation, or concealment); Apodeca v. People, 712 P.2d 467 (Colo. 1985) (first-degree kidnapping requires that the movement be more than that which is incidental to the underlying offense); State v. Jackson, 703 S.W.2d 30 (Mo. App. 1985) (kidnapping should not be charged where the movement is merely incidental to another offense); Brinson v. State, 483 So.2d 13 (Fla. 1st DCA), *review denied*, 492 So.2d 1335 (Fla. 1986) (when kidnapping is alleged to have been done to facilitate the commission of another crime, the movement or confinement must not be slight, inconsequential, and merely incidental to the other crime, must not be inherent in the nature of the other crime, and must have some independent significance).

[68] *See* Manual for Courts-Martial, United States, 1984, Part IV, paragraph 92(c)(2) [hereinafter MCM, 1984], which was changed by Executive Order 12473 to require that, for the offense of kidnapping, the holding must "be more than a momentary or incidental detention."

[69] *See* United States v. Santistevan, 25 M.J. 123, 126 (C.M.A. 1987).

[70] *Jeffress*, 26 M.J. at 973 (citing Chatwin v. United States, 326 U.S. 455, 463 (1946)) (comprehensive language used to cover every possible variety of kidnapping); 12 U.S.C. § 1201(a) (the so-called Lindbergh Act).

movement was only incidental to some other crime."[71] In the past, military law has followed this traditional view.[72]

A military accused may thus be charged with kidnapping pursuant to either theory:[73] under the more limited modern view as a violation of the assimilated law of some states,[74] or under the more expansive traditional view as a violation of the federal kidnapping statute.[75]

The accused in *Jeffress*, however, was charged and convicted under a third distinct theory. This third theory, the so-called "pure" article 134[76] theory, will support a conviction for kidnapping where the accused's conduct is prejudicial to good order and discipline or is service discrediting.[77] Relying on precedent,[78] the court in *Jeffress* found that the expansive traditional view must be applied to kidnapping charges under the "pure" article 134 theory.[79]

Given the availability of these three theories of kidnapping, the breadth of prosecutorial discretion in such cases is indeed great—perhaps too great.[80] Although prosecutorial discretion in the military is generally broad, the Court of Military Appeals has not hesitated to limit its breadth consistent with the interests of justice. For example, the scope of drug distribution is limited by the so-called *Swiderski* rule,[81] and an unreasonable multiplication of charges have been disallowed as being prejudicial.[82] Military prosecutors also have been required to charge consistent with Wharton's rule.[83]

The discretion available to the government with respect to kidnapping—the discretion, in essence, to pick and choose among these sources of a kidnapping charge for one that fits the evidence—seems to be in need of similar authoritative constraint. A soldier's culpability under assimilated state law, for example, may turn upon the vagaries of whether the particular jurisdiction has joined in following the modern view. Assuming the soldier's conduct does not amount to kidnapping under state law, he may nonetheless be guilty under the incorporated federal statute. Even assuming the elements of the federal statute have not been satisfied, the soldier may still be guilty of kidnapping under a "pure" article 134 theory.[84]

The court in *Jeffress*, referring to these concerns, wrote: "This charging practice has the capacity to create anomaly in the substantive military law of kidnapping. This situation indicates, in our view, the need for legislation to correct this anomaly."[85] Regardless of whether legislation is necessary, or the Court of Military Appeals can instead rectify this situation by decisional law,[86] the military's anomalous law of kidnapping should be re-examined with a view to addressing the problems identified in *Jeffress*. MAJ Milhizer.

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[71] *Jeffress*, 26 M.J. at 973 (citing Government of Virgin Islands v. Berry, 604 F.2d 221, 226 (3d Cir. 1979)).

[72] *Charlton*, 39 C.M.R. at 144. As noted by the court in *Jeffress:*

> *Charlton* was based upon an interpretation of the then existing District of Columbia statute on kidnapping which paralleled 18 U.S.C. § 1201. The court in *Charlton* applied the kidnapping statute of the District of Columbia, an act of the Congress of the United States, to a kidnapping which occurred in Danang, Viet Nam, on the rationale that, because the court looked to the District of Columbia code for the limitation on punishment, "necessarily" the elements of that code "should likewise govern." United States v. Charlton, 39 C.M.R. at 143. This rationale was later rejected in United States v. Scholten, 17 M.J. 171, 174 (C.M.A. 1984). The past practice of incorporating statutes of the District of Columbia into military law under Article 134 was stopped when the District of Columbia was granted home rule.

Jeffress, 26 M.J. at 973–74 n.1.

[73] United States v. Scholten, 17 M.J. 171, 175 (C.M.A. 1984).

[74] *See generally* Assimilative Crimes Act, 18 U.S.C. § 13. If kidnapping is charged as a violation of a state statute, the interpretation of the statute given by that state's appellate courts will determine whether the modern view will govern. *Cf.* Kolender v. Lawson, 461 U.S. 352 (1983) (opinions of state appellate courts are authoritative for purposes of defining a state statute). *See, e.g.*, United States v. Kline, 21 M.J. 366 (C.M.A. 1986).

[75] The so-called Lindbergh Act, ch. 271, 47 Stat. 326 (1932), as amended, 18 U.S.C. § 1201 (1982). Although the Supreme Court has recognized that a literal interpretation of the federal statute could have absurd results, Chatwin v. United States, 326 U.S. at 464, the statute has nonetheless been broadly construed. *See, e.g.*, United States v. Jones, 808 F.2d 561 (7th Cir. 1986); United States v. DeLaMotte, 434 F.2d 289, 292 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971).

[76] UCMJ art. 134.

[77] *See* United States v. Scholten, 17 M.J. at 175.

[78] United States v. Charlton, 39 C.M.R. 141 (C.M.A. 1969).

[79] *Jeffress*, 26 M.J. at 975.

[80] One means of limiting this discretion would be the preemption doctrine. Under this doctrine, the prosecution "is not allowed to use the Assimilative Crimes Act as a means to apply local law which differs from Federal criminal statutes applicable to the same conduct." United States v. Irvin, 21 M.J. 184, 188 (C.M.A. 1986). Although the Court of Military Appeals has applied the preemption doctrine on several occasions, *see e.g.*, United States v. Kline, 21 M.J. 366 (C.M.A. 1986) (state statute prohibiting reckless driving and wrongfully leaving the scene of an accident not preempted); *Irvin*, 21 M.J. 184 (C.M.A. 1986) (Colorado child abuse statute preempted), it has not found that the Lindbergh Act preempts assimilation of state kidnapping laws. *See generally Scholten*, 17 M.J. 171 (C.M.A. 1984); *cf.* United States v. Picotte, 30 C.M.R. 196 (C.M.A. 1961) (state kidnapping statute not preempted by unlawful detention under article 97, UCMJ).

[81] United States v. Swiderski, 548 F.2d 445 (2d Cir. 1977) (one who associates himself with the buyer of drugs solely for personal use may not be prosecuted for aiding and abetting drug distribution), adopted for the military by United States v. Hill, 25 M.J. 411 (C.M.A. 1988).

[82] *See, e.g.*, United States v. Taylor, 26 M.J. 7 (C.M.A. 1988); United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Sturdivant, 13 M.J. 323, 329–30 (C.M.A. 1982).

[83] United States v. Crocker, 18 M.J. 33 (C.M.A. 1984). Wharton's Rule provides that where an offense requires two or more culpable actors acting in concert, conspiracy will not be made out where the agreement exists only between the persons necessary to commit such an offense (e.g. duelling, bigamy, incest, adultery, and bribery). *See* MCM, 1984, Part IV, para. 5c(3).

[84] *Cf.* United States v. Mayo, 12 M.J. 286 (C.M.A. 1982) (where the evidence was insufficient to support the accused's conviction for a bomb threat charged under an incorporated federal statute, the court affirmed the accused's conviction as prejudicial conduct in violation of clause 1 of Article 134).

[85] *Jeffress*, at 974 n.2.

[86] The Court of Military Appeals has previously limited prosecutorial discretion without benefit of a statutory change. *See, e.g.*, United States v. Taylor, 26 M.J. 7 (C.M.A. 1988); United States v. Hill, 25 M.J. 411 (C.M.A. 1988); United States v. Hickson, 22 M.J. 146 (C.M.A. 1986); United States v. Crocker, 18 M.J. 33 (C.M.A. 1984); United States v. Sturdivant, 13 M.J. 323, 329–30 (C.M.A. 1982).

Update: Rights Warning Requirements in the Military

This Note is intended to provide counsel with the latest law regarding rights warning requirements in the military.

Public Safety Exception

In *United States v. Quarles*[87] the Supreme Court announced the "public safety" exception to the warning requirements established in *Miranda v. Arizona.*[88] The Court concluded that "the need for answers to questions in a situation posing a threat to public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination."[89] On August 15, 1988 in *United States v. Jones,*[90] the Court of Military Appeals noted that it was bound by the Supreme Court's interpretation of Miranda,[91] but also noted that Congress was free to impose article 31[92] warnings that did not contain a public safety exception.[93] Chief Judge Everett, writing the lead opinion, considered it unlikely that Congress intended to preclude questioning that protects the public safety.[94] He also agreed with the Army Court of Military Review that the policy concerns that justify a "public safety" exception to Miranda would justify a similar exception to article 31(b).[95] These statements, however, are dicta. The Chief Judge ultimately assumed that the unwarned statements were inadmissible and decided the case on other grounds. Judge Cox, concurring, warned military practitioners: "Our resolution leaves open the "public safety" question until another day."[96]

Prior Unwarned Statements

In *Oregon v. Elstad*[97] the Supreme Court held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.[98] The Court distinguished the prophylactic rules established in *Miranda* from the underlying constitutional rights that the warnings protect.[99] *Miranda* violations create a legal presumption of coercion, but do not necessarily constitute actual coercion.[100] The Court found little justification for excluding a warned, voluntary confession, merely because a prior, voluntary confession was unwarned.[101] On August 15, 1988 in *United States v. Ravenel,*[102] the Court of Military Appeals considered whether *Oregon v. Elstad* applies to the military. Chief Judge Everett, again writing the opinion of the court, reviewed prior precedent and the legislative history of article 31 and concluded that the protections of article 31(b) are broader in scope than those of *Miranda.*[103] He further concluded that the drafters of the Military Rules of Evidence intended that *Elstad* not apply to article 31(b) violations.[104] Again his comments are dicta, as the case was ultimately remanded to determine whether the "defense of another" defense was available to the appellant.[105] Furthermore, Judges Cox and Sullivan wrote concurring opinions indicating that they would apply the principles of *Oregon v. Elstad* to statements taken under article 31.[106] Notwithstanding the Chief Judge's opinion, the "*Oregon v. Elstad* question" must also wait until another day.

Overseas Exception

In *Edwards v. Arizona*[107] the Supreme Court held that an accused "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[108] On September 26, 1988 in *United States v. Coleman,*[109] the Court of Military Appeals clarified an "overseas exception" to application of the *Edwards* rule.[110] The court held that American investigators are free to advise a suspect of his rights, obtain a waiver of those rights, and interrogate the suspect even though they have *actual* knowledge that the

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[87] United States v. Quarles, 467 U.S. 649 (1984).

[88] Miranda v. Arizona, 384 U.S. 436 (1966).

[89] *Quarles,* 467 U.S. at 657.

[90] United States v. Jones, 26 M.J. 353 (C.M.A. 1988).

[91] *Id.* at 356.

[92] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

[93] *Jones,* 26 M.J. at 356.

[94] *Id.* at 357.

[95] *Id.*

[96] *Id.* at 360.

[97] Oregon v. Elstad, 470 U.S. 298 (1985).

[98] *Id.* at 318.

[99] *See id.* at 306–307.

[100] *See id.* at 306–309.

[101] *Id.* at 312.

[102] United States v. Ravenel, 26 M.J. 344 (C.M.A. 1988).

[103] *Id.* at 349.

[104] *Id.* at 350.

[105] *Id.* at 351–52.

[106] *Id.* at 352.

[107] Edwards v. Arizona, 451 U.S. 477 (1981).

[108] *Id.* at 485–86.

[109] United States v. Coleman, 26 M.J. 451 (C.M.A. 1988).

[110] *Id.* at 452.

suspect previously requested an attorney when being interviewed by foreign police. The court reasoned that the American suspect may have requested an attorney when dealing with foreign police because of added intimidations present in a foreign interview.[111] That same suspect, however, may be willing to deal with American police without the assistance of an attorney. A complete rights advisement prior to the American interview will adequately protect the suspect's rights. MAJ Gerstenlauer.

Solorio is Retroactive

In *United States v. Avila,*[112] the United States Court of Military Appeals (CMA) resolved one of the few issues left for subject matter jurisdiction in trials by courts-martial — the retroactive application of *Solorio v. United States.*[113]

Sergeant Domingo Avila was charged with sexually abusing his 4 year-old daughter at their off-post residence. At trial on 6 May 1986, he argued that because these offenses had no military impact, there was no subject matter jurisdiction. The trial judge disagreed, but the Air Force Court of Military Review dismissed for lack of subject matter jurisdiction.[114] Later, on appeal to the CMA, that court added a further issue "whether *Solorio v. United States* should be applied retroactively in this case?"[115] The CMA held that it should.

The court noted that there was "no question" whether the conduct involved in this case was unlawful at the time it occurred.[116] Thus, the accused had ample warning that his conduct was criminal. Moreover, citing the recent Supreme Court decision of *Griffith v. Kentucky,*[117] the CMA held: "Now, a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases state, or federal . . . with no exception for cases in which the new rule constitutes a clear break with the past."[118] In fact, the court believed that under the *Griffith* approach it had no option but to apply *Solorio* retroactively.[119]

Solorio now clearly applies to all offenses in trials by courts-martial.[120] If the specification states an offense under the Uniform Code of Military Justice, the issue of subject matter jurisdiction is resolved. Military status alone is now the operative test. MAJ Williams.

Contract Law Note

Minor Construction—New Authority to Renovate Facilities?

Recently Congress almost provided the Defense Department with a valuable tool for the administration of defense facilities and the Military Construction Program. The Defense Department is working with the Congress right now to revive it.

Section 315 of the Defense Authorization Act of 1987 [Pub. L. No. 99–661, 100 Stat. 3816 (1986)], now codified at 10 U.S.C. § 2811, authorizes the use of operation and maintenance (O&M) funds for "renovation" projects that combine maintenance, repair and construction work. This section arguably permits O&M monies to be used to fund projects in this new work category up to a $1 million ceiling, enabling installation commanders to satisfy certain mission requirements immediately, and to be more responsive to unforeseen defense priorities and security deficiencies. H. Rep. No. 718, 99th Cong., 2d Sess. 184 (1986).

Unfortunately, however, the Defense Department cannot use the authority provided in this section. The appropriation committees of the House and Senate vitiated the new law by directing that the minor construction portion of a renovation project may not be funded by more than $200,000 O&M monies. S. Rep. No. 368, 99th Cong., 2d Sess. 11 (1986); H. Rep. No. 1005, 99th Cong., 2d Sess. 734 (1986).

The Defense Department has long sought to convince the Congress that it has exercised too much oversight over the minor construction program, and this new law was an important step in eliminating some of that unnecessary oversight. The Defense Department will continue to ask the Congress to raise the minor construction project limitation from $1 million to $2 million, and the limitation on unspecified construction out of the O&M accounts from $200,000 to $400,000.

The Army has accordingly decided to not implement the renovation statute because the appropriations committee directive makes the law more restrictive than current statutes and policies governing maintenance, repair, or minor construction projects. *See generally* Army Reg. 420–10, Management of Installation Directorates of Engineering and Housing (2 July 1987) and Army Reg. 415–35, Minor Construction, Emergency Construction, and Replacement of Facilities Damaged or Destroyed (27 February 1987). Until further notice, the Army has directed that the term renovation will not be used in accomplishing the Military Construction Program. Message, HQ Dep't of Army, DAEN–ZCF–B, 071443Z Jan 87, subject: New Work Classification—Renovation. MAJ Munns.

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[111] *Id.* at 453.

[112] 27 M.J. 62 (C.M.A. 1988).

[113] 107 S. Ct. 2924 (1988).

[114] United States v. Avila, 24 M.J. 501 (A.F.C.M.R. 1987).

[115] *Avila,* 27 M.J. at 63.

[116] *Id.* at 64.

[117] 107 S. Ct. 708 (1987).

[118] *Avila,* 27 M.J. at 65.

[119] *Id.*

[120] Note, however, the issue of the retroactivity of O'Callahan v. Parker, 395 U.S. (1969) was examined by the Supreme Court in Gosa v. Mayden, 413 U.S. 665 (1973).

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publication in *The Army Lawyer*.

Legal Assistance Mailout 88–4

Legal assistance offices should recently have received a mailout including the *Model Tax Assistance Program* (which contains information, forms, articles, and a standard operating procedure to help the office establish and run an effective tax assistance program), the latest issue of the Air Force "Shortburst" series, several reports from the National Consumer Law Center, and fact sheets regarding living wills, survivor benefits, the home mortgage interest deduction, and lawyer referral programs.

Consumer Law Notes

Coping with the Post-Christmas Credit Blues

This is the time of year when the joys of giving are replaced by the agonies of paying. The legal assistance clients are lined up outside your door. Some of them need legal help; many need debt counseling or other assistance in management of their personal finances. Bankcard Holders of America (BHA), 460 Spring Park Place, Suite 1000, Herndon, Virginia 22070, (703) 481–1110, a nonprofit organization in which annual membership costs $18, publishes the following pamphlets and lists, which are available free to members and priced as indicated for nonmembers.

Getting Out of Debt ($1.00).

Managing Family Debt (discussing the advantages of debt consolidation companies, second mortgages, and financial counseling services) ($1.00).

How to Choose a Credit Card ($1.00).

The Wide World of Plastic (describing the legal liabilities and protections accompanying the use of credit, bank, travel and entertainment, automatic teller machine, and "smart" cards) ($1.00).

All That Glitters Is Not Gold (explaining the advantages and disadvantages of premium or "gold" credit cards) ($1.00).

Establishing Credit for the First Time ($1.00).

Re-establishing Good Credit ($1.00).

Putting Your Credit Credentials in Order ($1.00).

Building Credit: Banks Across the Nation Offering Secured Credit Cards ($3.00).

Credit Cards and Seniors ($1.00).

College Students and Credit ($1.00).

Credit Card Fraud ($1.00).

Ten Reasons to Shop with a Bank Card (focusing on the wise and prudent use of credit and reviewing the positive aspects of having a credit card) ($1.00).

Traveling With Your Credit Cards (comparing the use of cash, travelers checks, and credit cards when traveling) ($1.00).

In addition to these pamphlets on obtaining and using credit, BHA also publishes lists of banks offering "no annual fee" credit cards (($1.50), lists of banks offering cards with lower than the average (currently 18.6%) interest rate, ($1.50), and a 17-page money management guide on how to set up and live within a workable budget ($2.00), as well as pamphlets regarding consumer rights under federal law ($1.00), women's credit rights ($1.00), credit bureaus ($1.00), solving credit card billing questions ($1.00), the dangers of credit repair clinics ($1.00), and the advantages and disadvantages of leasing, as opposed to buying, a car ($1.00). These publications are typically highly informative and very practical. They may help legal assistance attorneys provide practical guidance to financially over-committed clients and they may form the basis for preventive law classes designed to prevent these financial woes.

Consumer Bills in Congress

Two bills recently introduced in Congress may provide some relief for those frustrated in attempts to obtain credit. If passed, an amendment[121] to the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691 (1982), would prohibit discrimination by creditors against members of the armed forces. Military members are not currently among the groups protected by the ECOA, which prohibits discrimination based only upon race, color, religion, national origin, age, receipt of income from a public assistance program, and the good faith exercise of rights under the Consumer Credit Protection Act (15 U.S.C. §§ 1601–93).

Another bill[122] would amend the Fair Credit Reporting Act, 15 U.S.C. § 1681 (1982), to require prompt disclosure by any consumer reporting agency (CRA) to any consumer of adverse information relating to that consumer which is received by the CRA. Currently, CRA's are required to provide this information only if a consumer initiates a request for the information, so most consumers are unaware that their files contain negative information until they apply for and are denied credit. 15 U.S.C. § 1681g (1982).

Family Law Note

Adoption Expense Reimbursement Program

The Department of Defense recently promulgated guidance on the adoption expense reimbursement program that Congress created in the National Defense Authorization Act for Fiscal Years 1988 and 1989 (§ 638, Pub. L. 100–180, 101 Stat. 1106 (1987)). This program was previewed in the Family Law Notes section of the June 1988 edition of *The Army Lawyer*, and now DOD has issued its implementing DOD Instruction 1341.4. Additionally, on November 1, 1988, the Army Finance and Accounting Center published Memorandum of Instruction (MOI) 89–02, entitled "Test Program for Reimbursement for Child Adoption Expenses." This document establishes the procedures for applying for reimbursement and for paying reimbursement claims. This note summarizes the MOI, but it is important to note that many of the limitations in the program stem from statutory requirements.

Background

The Defense Authorization Act instructed the Secretary of Defense to establish a test program to reimburse service

[121] H.R. 5482, introduced by Representative Panetta (D. Cal.).

[122] H.R. 5528, introduced by Representative Shaw (R. Fla.) and referred to the House Committee on Banking, Finance, and Urban Affairs.

members for qualifying child adoption expenses. The test period is from October 1, 1987, to September 30, 1989. There is no provision to extend this program beyond September 30, 1989.

Applicability

The guidance in the MOI applies to active duty and active Guard/Reserve (AGR) soldiers who are ordered to active duty for a period in excess of 179 days. It also applies to installation JA offices and installation finance and accounting offices. The MOI was jointly prepared and approved by the Director of Finance and Accounting and The Judge Advocate General.

Entitlement

An active duty member of the Armed Forces who initiates adoption proceedings after September 30, 1987, but before October 1, 1989, may be reimbursed a maximum of $2,000 per child for adoption expenses. The term "active duty member" includes AGR soldiers who are ordered to active duty for a period in excess of 179 days under Title 10 or Title 32 of the U.S. Code, and the term "initiates adoption proceedings" means the date of the initial home study report or placement of the child in the soldier's home for the purpose of adoption, whichever occurs later. In the event of multiple adoptions, the maximum amount reimbursable is $5,000 per calendar year. Claim form submission dates will be used to calculate the period of elapsed time between claims. For this test period, the term "calendar year" means:

October 1, 1987–December 31, 1987
January 1, 1988–December 31, 1988
January 1, 1989–September 30, 1989

If both parents are members of the Armed Forces, only one member may be reimbursed for the expenses related to the adoption of the same child. If multiple adoptions are involved, two military parents are treated as one family unit. The maximum of $5,000 per calendar year for multiple adoptions applies to the family unit.

Adoptions that qualify for reimbursement include adoptions by a married couple, adoptions by single persons, adoptions of infants or older children, either U.S. or foreign adoptions, and adoptions of children with special needs as defined in 42 U.S.C. § 673(c). Adoptions of stepchildren do *not* qualify, but adoptions of other relatives, such as grandchildren, do qualify for reimbursement. A final, *legal* adoption is the predicate for all reimbursements.

Reimbursement under the test program will be paid only after the adoption is final. Reimbursement is not available for any expense paid to or for a member of the Armed Forces under any other adoption benefits program administered by the Federal Government or any such program administered by a State or local government.

Reimbursable Expenses

The finance center has authority to reimburse for the expenses listed below. Some additional expenses may be allowed if the soldier cannot qualify for the full $2,000 reimbursement by using these categories of expenses, but the matter will be referred to DOD Family Policy Office for a ruling on the additional expenses (up to the $2,000 limit). The finance office can evaluate and pay the following expenses:

(1) Fees charged by public and private adoption agencies, including agencies in foreign countries.

(2) Placement fees, including fees charged the adoptive parent for counseling.

(3) Legal fees, including court costs.

(4) Medical expenses that are for: a) health care provided to the adoptive child before adoption—this includes hospital expenses for newborn care; and b) physical examinations for the adoptive parents that are part of the adoption process; and c) the biological mother's pregnancy and for childbirth.

(5) Temporary foster care charges when payment of these charges is made immediately before the child's placement.

(6) Personal travel expenses, including lodging and meals, that relate to the adoption and which are: a) incidental to complying with a statutory condition required by the country of the child's origin or otherwise necessary to qualify for the adoption; or b) necessary to assess the health and status of the child; or c) necessary to escort the child to the U.S. or to the adoptive parent's home; or d) necessary to attend counseling that is related to the adoption.

Claims Submission and Processing

Claims must be submitted on forms available at the installation finance office, but legal assistance offices may want to have a stock on hand to distribute to interested clients. The completed forms, together with the necessary documentation, are to be submitted to the local finance office, either in person or by mail. The MOI specifies that personnel at the finance office will provide assistance in completing the forms.

Application for reimbursement can only be made by soldiers on active duty; a soldier who has separated from active duty cannot submit a claim even if expenses were incurred while on active duty. Soldiers who leave active duty *after the adoption is final* and *after signing and submitting a claim* to a finance office are entitled to the proceeds of the claim. Additionally, soldiers who are eligible for reimbursement can include in their claim qualifying expenses that were incurred prior to entry on active duty and prior to the beginning of the program (i.e., October 1, 1987).

Claims may not be submitted until the adoption is final, and all reimbursements must be substantiated by documentation. "Documentation" means receipts marked "Paid" or cancelled checks and the associated receipts.

Soldiers must wait until the adoption is final before filing a claim, but they should file within 180 days after it becomes final (or within 180 days of the date of the MOI for adoptions that were final before November 1, 1988). Claims that are submitted late may be payable, but they should be sent to the following address instead of the local finance office:

Office of Family Policy and Support
OASD (FM&P) (FSE&S) Room 3A272
The Pentagon
Washington, D.C. 20301–4000

The claims forms must be accompanied by the following documentation:

(1) The home study report and the final placement papers (note: the MOI requires submission of the home study report *or* the final placement papers, but other instructions suggest that the finance office needs *both* the report *and* the placement papers); the finance office will copy these documents and return them to the soldier. Alternatively, a letter from the adoption agency, or from a lawyer in the case of an independent adoption, that states the dates of the home study report and the final placement is sufficient to meet this requirement; and

(2) Copies of all substantiating receipts or checks that pertain to expenses for which reimbursement is claimed.

The finance office will send a copy of the placement documents to the local SJA office for an opinion as to whether the adoption is final. If it is, the finance office will arrange for the payment, minus a flat 20% withholding for federal tax purposes and an appropriate withholding for state tax purposes; no FICA taxes will be collected. If the SJA office advises that the adoption is not final, the claim packet will be returned to the soldier without action.

Army finance offices will process claims only for Army personnel. Members of other services should be advised to contact the following offices:

Air Force: The accounting and finance, or legal, or personnel office at the member's servicing base.

Navy: Legal Assistance and Policy Branch,
OJAG (Navy Code 12)
200 Stovall Street
Alexandria, Virginia 22332–2400
AV 221–9752 Com'l (202) 325–9752

Marine Corps: HDQS USMC (Code JAL)
Legal Assistance Office
Washington, D.C. 20380–0001
AV 224–3886 Com'l (202) 694–3886

The Army point of contact for further information is as follows:

Office of the Director of Finance and Accounting
ATTN: SAFM–FAP–PA (Mr. Bill Hunnicut)
Indianapolis, Indiana 46249–1006
AV 699–3202 —MAJ Guilford

Professional Responsibility Note

Illinois Lawyer Suspended for Failure to Report Misconduct

An Illinois lawyer who failed to report to an Illinois disciplinary committee that another attorney had converted a client's funds has been suspended from the practice of law for 1 year. *In re Himmel,* Ill. Sup. Ct., No. 65946, 9/22/88. 4 ABA/BNA Lawyer's Manual on Professional Conduct 332.

The attorney's client had previously hired another attorney in 1980 to represent her in a personal injury case. The first attorney, Casey, negotiated a $35,000 settlement but failed to turn the funds over to the client. The client then hired the second attorney, Himmel, to recover her funds. Himmel prepared an agreement providing that Casey would pay the client $75,000 in exchange for her promise to drop any claim of misappropriation against him.

Himmel failed to report Casey's misconduct to the disciplinary committee. The Illinois Supreme Court rejected Himmel's defenses that the client had reported the misconduct to the disciplinary committee before he was hired and that he had not reported the misconduct because Casey had told him not to do so. According to the court, an attorney may not circumvent his duty to uphold the rules of ethics whenever a client asks him to do so.

The only real issue, according to the court, was whether the information concerning the misappropriation was privileged. The evidence presented to the court established that the client gave information about the conversion, in Himmel's presence, to her mother, her fiance, and an insurance company representative. The court concluded that information is not privileged if a client discloses it in the attorney's presence to third parties who are not agents of the attorney. Therefore, the court did not excuse Himmel for failing to report the misconduct to the proper tribunal.

Army attorneys who fail to report ethical misconduct also face possible disciplinary sanctions. Rule 8.3 of the new Army Rules requires an attorney to report violation of the Army Rules by another attorney if the violation raises substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer. Dep't of Army, Pam. 27–26, *Rules of Professional Conduct for Lawyers,* Rule 8.3 (31 Dec. 1987). Misappropriation of a client's funds is obviously one type of misconduct that raises a substantial question of fitness to practice and therefore triggers a duty to report under the Army Rules. It is important to note that the term "substantial," as used in Army Rule 8.3 refers to the severity of the violation and not to the quantum of proof required before there is a duty to report.

The procedure for investigating violations of the Army Rules is contained in Chapter 5 of Army Reg. 27–1, *Judge Advocate-Legal Services* (1 Apr. 1984). There is no requirement that the attorney discovering the violation confront the violator. Indeed, under Army Regulation 27–1, The Judge Advocate General must approve any investigation or inquiry into a potential ethical violation. MAJ Ingold.

Tax Notes

Congress Approves New Tax Act

After several months of negotiation and refinement, Congress has enacted the Technical and Miscellaneous Revenue Act of 1988, H.R. 4333, 100th Cong., 2d Sess. (1988). The Act makes numerous technical corrections to the Tax Reform Act of 1986, amends other recent statutes, and includes several new provisions including a modified "Taxpayer's Bill of Rights."

The "Taxpayer's Bills of Rights" will require the Internal Revenue Service (IRS) to explain a taxpayer's rights and the IRS obligations during an audit, appeal, refund, or collection. The Act mandates abatement of penalties based on erroneous written advice issued by the IRS and restricts the IRS ability to issue enforcement quotas and cancel installment agreements. The IRS seizure and levy process is modified under the new Act, and taxpayers will be allowed to recover damages for failure to remove wrongful liens.

The Act includes a provision which will serve as an incentive for soldiers to begin saving for their dependents' college expenses. Interest income earned from qualified savings bonds, such as Series EE U.S. Government bonds, will be excluded from income if the bonds are transferred to an

educational institution after 1 January 1990. The transaction must be for the tuition or fees of the taxpayer or the taxpayer's spouse or dependents. Bonds purchased in the child's name before 1990 do not qualify for this exclusion. Moreover, taxpayers may not convert current series E or EE bonds to new bonds after 1990 to qualify for tax free treatment.

The tax break on bonds used for college expenses will be limited to families under certain income thresholds. For example, persons who are married and file joint returns lose the interest exclusion when their adjusted gross income exceeds $90,000. The exclusion for joint filers will begin to phase out after their adjusted gross income exceeds $60,000.

The bill includes a provision that will prevent parents from claiming personal exemptions for children attending college full-time when they reach age 24. Under current law, a parent can take a dependency exemption for a child who is a full-time college student regardless of the student's age or income.

Another provision in the Act affects parents of children under age 14. Beginning in 1990, parents of children under 14 will have the option of including children's interest and dividend income on the parent's return. The child will not have to file a return unless total income exceeds $5,000. For tax year 1988, a child under age 14 will have to file a return if he or she has unearned income of over $500.

Owners of publicly offered mutual funds will benefit from a provision in the Act which delays implementation of a rule in the Tax Reform Act of 1986 taxing publicly offered mutual fund owners on their share of fund expenses. Under the rule, mutual fund owners were required to include in gross income the part of the mutual fund's management fees and expenses allocated to their shares. The owners would then be able to deduct these expenses as miscellaneous expenses, but only to the extent that these expenses when combined with other miscellaneous expenses exceed two percent of the taxpayer's adjusted gross income. Congress initially delayed implementing this rule for tax year 1987 only but has now extended the delay for 1 additional year to include tax year 1988.

As expected, the new Act includes several provisions affecting the owners of single premium life insurance contracts. If loans and other pre-death payouts under these policies, statutorily defined as "modified endowment contracts," exceed certain levels, they will be taxable to the recipient to the extent of policy income. The legislation includes a complicated seven-part test to identify which policies will receive this special tax treatment. The new law will affect insurance contracts entered into after 20 June 1988. A major tax benefit of owning life insurance policies, deferral of tax on the income from amounts invested, is not affected by the new legislation. MAJ Ingold.

Deferral of Gain Unavailable Upon Purchase of Membership in Retirement Home

Many elderly Americans are selling their homes and purchasing membership interests in the retirement communities springing up across the country. According to a recent private letter ruling issued by the IRS, one may be taxed on the gain realized upon sale of a home even though the proceeds from the sale are used to purchase the retirement home interest. Priv. Ltr. Rul. 8,837,020 (June 15, 1988).

In order to avoid taxation of the gain, the cost of the replacement residence must exceed the adjusted sale price of the old residence and the new home must be purchased within two years of the sale of the old home. I.R.C. § 1034 (West Supp. 1988). The two-year replacement period following the sale of the former residence is suspended for a total of up to four years for soldiers serving on active duty and soldiers serving overseas are given up to eight years to purchase the replacement residence. I.R.C. § 1034(h) (West Supp. 1988).

To avoid taxation of the gain under section 1034, the taxpayer must obtain a legal interest in the replacement residence. According to the IRS, the purchase of a transferable membership in a life care retirement facility does not qualify as a legal interest for purposes of section 1034 rollover treatment. The IRS cited a Tax Court ruling as the basis for concluding that there is an "unequivocal mandate that section 1034 nonrecognition of gain be permitted only to the extent that a taxpayer continues to hold title in fee simple to property which is occupied as a principal residence." *Boesel v. Commissioner*, 65 T.C. 378, 386 (1975).

The IRS did not specify what particular features of the membership interest held by the taxpayer led to this conclusion. The retirement lifecare facility involved in the ruling was operated by a public benefit corporation. Membership in the community is available to individuals meeting certain requirements concerning age, health, and financial stability. A one-time lump sum payment is required to join the community and payment of the fee entitles the member to occupy a residential unit and receive services such as food, housekeeping, recreation, and health care.

Membership in the retirement community is transferable. A member may sell the interest at any time during life and, upon death, the estate may sell the interest in the facility. Upon sale of the interest, the member must pay a commission to the corporation operating the facility. The property on which the facility is located is leased by the corporation with an option to buy.

It is unclear whether a change in any of these facts would lead to a different conclusion. For example, if the corporation operating the facility owned the property, the membership interest would be much like a cooperative housing facility. The purchase of stock in a cooperative housing corporation qualifies for section 1034 rollover treatment as long as the cooperative unit is occupied by the taxpayer as the principal residence. I.R.C. § 1034(f) (West Supp. 1988).

Even if they are taxed on the gain under section 1034, elderly taxpayers selling their homes to invest in retirement communities may still take advantage of section 121 of the code which grants a once-in-a-lifetime exclusion of up to $125,000 of gain realized on the sale of a principal residence. I.R.C. § 121 (West Supp. 1988). To qualify for the exclusion, the taxpayer must have resided in the former residence for more than 3 of the 5 years preceding the date of sale. There is, however, no requirement for a repurchase to qualify for the exclusion. MAJ Ingold.

Welfare Reform Legislation Passed

President Reagan signed into law the Family Support Act of 1988, H.R. 1720, P.L. 100–485, 100th Cong. 2d Sess. (1988), a comprehensive Act designed to overhaul the welfare system. Although not intended to be a revenue measure, the legislation includes provisions that will affect tax treatment of parents of dependent children.

The Act contains several measures that will reduce the benefit of the child care credit. For tax years beginning after 1988, a child is eligible for the credit only if under age 13. Under current law, which will remain in effect for 1988 returns, the credit is available for care provided to children under age 15.

The Act also requires that the amount of the credit be reduced dollar for dollar by the amount of dependent care provided by an employer but excluded from gross income under section 129 of the code. This section allows taxpayers to exclude from gross income up to $5,000 per year paid to the taxpayer as reimbursement for child care under an employer-provided dependent care program. I.R.C. § 129 (West Supp. 1988). Under the new legislation, the expenses eligible for the child and dependent care credit will be reduced by the amount excluded from income pursuant to an employer-sponsored program.

A taxpayer claiming the child or dependent care credit must identify on the income tax return the care-provider's name, address, and social security number. Child care providers are required to furnish this information to the taxpayer. Failure to include this information on a return could lead to denial of the child care credit unless the taxpayer can show that he exercised due diligence in the attempt to discover the information.

Under current law, taxpayers claiming a dependency exemption for a child over 5 years old must report the social security number of the dependent on the return. I.R.C. § 6109 (West Supp. 1988). The new law, which will take effect for 1989 returns, requires that the social security number be listed for any dependent who is over 2 years old. MAJ Ingold.

Administrative and Civil Law Note

Digest of Opinion of The Judge Advocate General

(Standards of Conduct—Attendance of Army Personnel at USO Fund-Raiser). DAJA–AL 1988/2372 (27–1a), 11 August 1988.

The participation of DA personnel in the activities of private organizations is strictly controlled by Army regulations. Under certain circumstances, participation is allowed but the variety of issues that may arise requires an analysis of each issue based on the facts involved in each case. A recent USO fund-raiser in Germany sponsored by a non-profit, charitable organization, "Heart for USA," raised two issues for TJAG's analysis.

The first issue concerned the acceptance of free tickets to the fund-raiser, which included a meal and entertainment. Five hundred tickets were purchased by a commercial enterprise, AFN–TV Guide, donated to "Heart for USA," and offered to the military commands in Germany for distribution. TJAG opined that the resolution of this issue requires identification of the true donor. If AFN–TV Guide is the actual donor, acceptance would not be appropriate (paragraph 2a (1), AR 600–50). If, however, the tickets were donated to "Heart for USA" with no conditions attached and if "Heart for USA" gives them to military commands unconditionally, then the tickets may be accepted. Further distribution to individuals must be in accordance with AR 600–50 and AR 1–101 and the commands receiving the tickets should note that paragraph 7a (4) and (5), AR 1–101 prohibits any public announcement or acknowledgement of the gift.

The second issue concerns the general participation of military personnel in the fund raising activity. TJAG stated that although there is no prohibition against military personnel attending such an event, their participation may not suggest official DA participation and endorsement of the event. Even though the USO mission is recognized in AR 930–1, this does not authorize official participation in fund raising efforts on behalf of USO. In particular, DA officials should not allow their names and titles to be used in connection with the fund raising event (paragraph 2–1 p, AR 600–50).

Claims Report

United States Army Claims Service

Case Study: Evaluating Damages in a Medical Malpractice Claim

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There are two facets to the proper investigation of any tort claim that appears meritorious. The first involves the determination of liability; the second, the quantum of damages to be awarded.

Historically, field claims offices have performed an excellent job of conducting thorough investigations on the issue of liability. Many offices, however, believe that their investigative responsibility ends when liability is established. They

overlook the importance of investigating damages, and all too often make offers of settlement without obtaining all relevant social, medical, and financial information concerning the claimants. The Claims Service frequently gets telephone inquiries from the field regarding the "going rates" for particular injuries or events. The response is invariably that each case is unique and should be assessed on its own facts. Knowing your particular claimant is the only way to effect a settlement that is fair to the claimant as well as to the United States. This important point is illustrated by the following case history, in which a thorough investigation of damages resulted in a settlement which fairly met the family's needs, but which was significantly less than the amount that was initially estimated by either the claimants' attorney or the Claims Service.

Incident

Claimant, a diabetic, was the 36-year-old dependent wife of an active duty soldier assigned outside the United States. The claimant was admitted to an Army medical facility with abdominal pain and vomiting. She had been drinking cognac and Coca-Cola the previous evening and had missed her regular insulin dose. Laboratory studies performed at the time of admission were consistent with diabetic ketoacidosis (DKA), a life-threatening condition that is caused by excessively high levels of sugar in the blood stream and that can result in coma or death if untreated.

Claimant's DKA was appropriately treated and resolved following administration of fluids and insulin. Claimant's nausea and vomiting persisted, however, and intravenous fluids were started because of poor fluid intake. Unfortunately, claimant's gastrointestinal problems continued. Ten days later, her physicians were concerned that she would become malnourished. Therefore, the military physicians decided to begin total parenteral nutrition (TPN) (concentrated liquid nutrition administered via a central line placed into the left subclavian vein, located above the heart and in close proximity to the left lung).

A catheter was inserted into the subclavian vein, and a chest x-ray was performed to determine whether the catheter tip was in the proper place. The chest film was interpreted by the radiologist as indicating good tip placement. Unfortunately for claimant, this was not the case. The day after catheterization, claimant first began to complain of pain in the left side of her chest. She continued to complain of chest and shoulder pain each day for the next five days. At one point, this pain was attributed by her physician to the presence of the central venous line; however, no action was taken other than administration of narcotic analgesics and other pain control therapies. Claimant's physician believed that a great deal of claimant's pain was solely in her head. Late on the evening of the fifth day, the nursing staff noticed that the claimant appeared to be breathing at an abnormally rapid rate and was somewhat confused. The nurse properly alerted the physician on call, who elected not to come in and examine his patient. Believing that claimant might be going into DKA again, he prescribed insulin and fluids over the phone. By 0800 hours the next day, claimant had a barely detectable blood pressure of 60/0 (normal is 120/60), and she was complaining of an inability to breathe.

A nurse found claimant unresponsive at 0830 hours, and claimant suffered cardiac arrest at 0834 hours. The nurse called a "code" and immediately started cardiopulmonary resuscitation. When the code team responded, the team leader listened to claimant's chest and heard decreased breath sounds over the left portion. He inserted a needle to determine whether fluid was building up in the chest, and withdrew milky fluid. He then inserted a chest tube and drained a large quantity (between 750 and 1500 milliliters) of the milky fluid, subsequently determined to be TPN solution.

Although normal cardiac function was restored, claimant never regained consciousness following her arrest. It was determined that she had been experiencing hypoxia, or insufficient oxygenation of the brain, for several hours prior to her ultimate respiratory arrest. By the time she actually did arrest, claimant had experienced irreversible brain damage despite immediate and adequate pulmonary and cardiac resuscitation. Claimant remained in a coma for seven months, until she died from complications of her comatose condition and underlying diabetes.

Liability

Shortly after claimant went into a coma, but prior to her death, claims were filed on behalf of claimant, her husband, and her two minor children. The original personal injury claims filed were subsequently amended to include demands for damages experienced by the survivors as the result of claimant's death. The claims were determined to be cognizable under the Military Claims Act, 10 U.S.C. § 2733, and Chapter 3, AR 27–20, which authorize compensation for injuries caused by the negligence of military members or civilian employees of the United States Armed Forces acting within the scope of their employment outside the United States. Liability in these cases is normally determined in accordance with general principles of American Law as stated in standard legal publications. (See paragraph 3–12, AR 27–20.) Both wrongful death and survival actions have been determined by the Claims Service to be cognizable under these principles.

Following medico-legal review, the claims were determined to be meritorious. Although claimant's care during her admission was appropriate with respect to the diabetic complications that prompted her hospitalization, and with respect to her treatment with hyperalimentation, a review of the chest x-ray performed after insertion of the subclavian catheter revealed that it had been misread and that the catheter tip was not properly inserted. The catheter tip had passed downward to the left of the sternum into either a mammary vein or an intercostal vein instead of the superior vena cava.

Malposition of the catheter tip is a well-recognized problem of subclavian vein catheterization, and is generally not a serious complication *if recognized early*. Because the infusion of solutions such as TPN can cause thrombosis (blood clotting), phlebitis (inflammation of the vein) and vessel wall erosion in narrow vessels, it is imperative that the tip of the catheter be accurately positioned in the superior vena cava, with its large volume of blood flow. In this case, infusion of the TPN solution into a minor vessel caused damage to the vessel wall and allowed the catheter tip to erode through the wall. The TPN solution thereafter drained into claimant's chest cavity, displacing the left lung and other mediastinal contents to the right side of the chest.

In the reviewers' opinion, the physicians caring for claimant after the insertion of the catheter failed to recognize symptoms suggesting irritation from the catheter tip malposition (pain in the shoulder and chest). They failed to heed her complaints of increasingly frequent and ominous chest pain, shortness of breath, and back and shoulder pain, in addition to ignoring obvious symptoms of hypoxemia and hypoxia on the morning of her cardiac arrest, such as changes in mental status and incontinence.

Damages

Establishing that liability existed in this case was only the first step in the investigation. The most difficult step remained to be done; investigating the nature and extent of the injury and damages experienced as the direct result of that negligence.

At first blush, the potential damages in this case appeared to be considerable. The decedent was a thirty-six year-old wife and mother of two children. She also appeared to have experienced considerable pre-death pain and suffering. Although mental anguish of her survivors was not compensable under AR 27–20, compensation could be made for the pecuniary loss that they experienced as a result of the death of their wife and mother. This would include the pecuniary value of the household services that her husband would have enjoyed during the remainder of her or his lifetime, whichever was less; the value of her lost earnings calculated over her worklife expectancy; the pecuniary value of her children's loss of her parental guidance and love during the period of their minority; the pecuniary value of the loss of her consortium on the part of her husband; and funeral expenses and unreimbursed expenses of her last illness (which were considerable in light of the fact that she and her family were moved twice between the time she went into a coma and her death).

The initial estimate of damages was substantially reduced following a thorough investigation of claimant's personal and medical history. The investigation revealed that claimant's remaining life expectancy, but for the negligence, was severely diminished as the result of her multiple medical problems, and that the quality of her remaining life, but for, the negligence would have been less than optimal.

The damages investigation started with an interview with claimant's surviving spouse. A complete personal history was obtained, to include a chronology of his military career and of his relationship with his wife and their children. As frequently occurs during such interviews, the spouse painted a rather rosy picture of marital and familial bliss. The interviewer also attempted to ascertain what the family's needs would be in light of the loss of claimant. Additionally, the interviewer attempted to discover what the family really wanted from a settlement in the case—was the primary concern a college education for the children; did the spouse wish to complete a military career or to start fresh in the civilian sector; or was the spouse really only interested in cash, a new house, or a sports car. In this case, the spouse expressed a desire to continue with his military career, to be reassigned to his home state, to have funding for domestic and child care services, and to see that his children received a college education.

The next step in the damages investigation was gathering every available medical record on claimant, starting with her military outpatient treatment records. Unfortunately, not all of her outpatient records could be located. The available records, however, indicated that claimant had a long history of multiple medical problems: fifteen years earlier, claimant had been hospitalized for a Harrington-rod operation secondary to scoliosis (placement of a steel rod in her spine to correct curvature). Over the next seven years, she had experienced chronic problems with abdominal pain accompanied by nausea and vomiting that occurred every three to four months and required repeated hospitalizations. Following that, she was hospitalized for over five months because of gastrointestinal complaints, and was fed via a central intravenous line. Three years later, she was diagnosed as having adult-onset, Type I, diabetes that proved difficult to control despite insulin injections.

Claimant's uncontrolled diabetes first necessitated a hospitalization for severe dehydration, DKA, pancreatitis, and intractable nausea and vomiting; the next year, she was hospitalized for a closed-loop small bowel obstruction and DKA; the following year, she was hospitalized for shortness of breath, maxillary sinusitis and DKA; the year after that, she was hospitalized for malaise and a sore throat; and two years later, shortly before her ill-fated admission in Germany, she was hospitalized for an infected axillary cyst and urinary tract infection. Claimant's medical records also revealed that she had a family history of diabetes. Her mother died at the age of 38 from complications of her diabetes. (Copies of all available inpatient charts for the aforementioned admissions were also obtained during the damages investigation.)

Claimant's long and complex medical history clearly indicated that she would not have had an otherwise-normal life expectancy. At the time of her arrest, claimant was almost 36 years old. According to standard life tables, her normal remaining life expectancy was 40 years. Claimant's life expectancy, however, was drastically reduced because of her preexisting Type I, adult onset diabetes mellitus. Type I diabetics have less ability to regulate their body's sugar naturally and are, therefore, more insulin-dependent. Control of the body's sugar with insulin is not as efficient as natural physiologic control. Type I diabetics usually develop more complications from their diabetes and consequently have a shorter life expectancy than Type II diabetics. During the damages investigation, an expert in diabetes was consulted. He stated that, generally speaking, Type I diabetics have their life expectancy shortened by twenty to thirty years.

Additionally, claimant suffered from hyperlipidemia, characterized by elevated cholesterol and triglyceride levels, both of which are associated with an increased incidence of coronary artery disease. Finally, claimant had at least a three-year history diabetic retinopathy prior to her arrest. This condition, although not fatal, is usually associated with other microvascular diseases, such as kidney and neurologic dysfunction, which can lead to a premature death.

Because of the above described significant medical factors, an anticipated remaining life expectancy of twenty years, rather than forty, was used for the purpose of determining damages in this case.

In addition to determining the number of years the claimant would likely have lived, the expected *quality* of those remaining years had to be taken into consideration. As stated previously, over the course of the previous fifteen years, claimant had been hospitalized over a dozen times,

for up to five months at a time. Even at the time of her arrest, claimant was in the midst of a prolonged hospitalization for DKA and chronic gastrointestinal problems.

Claimant's medical records also indicated that she experienced severe emotional problems. During several of her hospital admissions, claimant was reportedly troubled and frustrated with her diabetic condition. She was diagnosed as having situational depression during one admission, and was referred to psychology for "stress management" during a subsequent admission. During her fateful admission, she reported an eighteen-month history of insomnia and admitted to being a "loner" who only wanted to live to see her children grown.

Because of her brittle diabetes, repeated hospitalization and other emotional and physical problems, it was highly unlikely that claimant would have been able to engage in future employment. At the time of her arrest, she was not employed. According to her husband, she had worked only sporadically during their marriage, usually in military day care centers. (Note: claimant's attorney did not submit any substantiation of lost past or future wages, such as old tax returns.) Therefore, no award was made for loss of future earnings.

Additionally, because of claimant's physical and emotional problems, it was successfully argued during negotiations that she could not have been able to function completely as a wife and mother. Claimant and her husband had been married for fourteen years. This was the first marriage for the husband and the second marriage for claimant. The couple had a twelve-year-old adopted son, as well as an eight-year-old natural daughter.

An additional argument successfully used during the negotiations was that the husband was suffering from a drinking problem (a fact which was discovered during interviews with the nursing staff caring for claimant after her cardiac arrest), that claimant had the indicia of being an abused spouse (ascertained via entries in her outpatient records), and that they had neglected and/or abused their son. This last fact was discovered accidentally when the documentation surfaced in response to a request for the pertinent hospital's Family Advocacy Team records. The original request had been for any record of spouse abuse.

Instead of the rosy home life and marital portrait painted by her husband during his interview, the picture which emerged following the damages investigation was one of a very sick lady, both physically and mentally, with a diminished life expectancy, set in the midst of a very troubled family. The pecuniary value of the loss of household services, consortium and parental guidance and support was correspondingly reduced as a result.

The amount of compensation for claimant's pre-death pain and suffering was also reduced because the period of conscious pain and suffering was confined to the time between the insertion of the subclavian catheter and claimant's cardiac arrest. Under general principles of American law, consciousness of physical pain and suffering on the part of the claimant is a prerequisite to compensation therefor. Subsequent to the cardiac arrest, claimant had been examined by an independent, civilian neurologist at government expense. The neurologist determined that claimant was permanently and irreversibly comatose, and that, since the time of the cardiac arrest, she had been nonreactive to pain or other stimuli. Therefore, no award for conscious pain and suffering could be made for the period between claimant's cardiac arrest and her death.

Following extensive negotiations, a structured settlement was agreed upon by all parties. The structured settlement consisted of a stream of benefits to the widower and his two children to meet their future financial needs created by claimant's death. The structure provided for a monthly sum of $500, payable to the widower as long as he lived, but guaranteed for a period of 15 years, to cover the expense of hiring live-in help to perform ordinary household tasks. The structure also provided for an additional monthly sum of $500, $250 per child payable to the custodial guardian, to cover the expenses of child care for the children before and after school and during weekends during the remaining years of minority. Further, the structure provided for "college funds" in the event that the children wished to pursue higher education or technical training. Finally, the structure provided for $20,000 in cash and attorneys fees. The cost of the above-described elements of the structure were as follows:

(1)	Cash	
	(a) Advanced	$10,000
	(b) At Settlement	$10,000
(2)	Income to husband, $500 monthly for life, guaranteed 15 years	$64,554
(3)	Custodial Annuity $500 monthly until youngest child is age 18	$39,204
(4)	College Funds $10,000 per child per year for four years, beginning at age 18	$39,056
(5)	Legal Fee	$40,703
(6)	Total	$203,517

Conclusion

It should be obvious from the above case study that the claims investigation is not over once liability is established. The real work of investigating damages still lies ahead. Reference to an Injury Valuation Handbook is never an acceptable substitute for a thorough investigation of the facts and an exploration of the lives of the unique individuals who have presented the tort claim. A thorough investigation will invariably result in a settlement that meets the needs of the claimant at a price acceptable to the government.

Personnel Claims Notes

Claims for Unusable Airline Tickets

Field claims offices continue to receive claims from soldiers who purchase nonrefundable airline tickets, and later have their leaves cancelled or orders changed so that they are unable to use the tickets. Such claims are not payable as losses incident to service under the Personnel Claims Act (31 U.S.C. § 3721) or under any other claims statute. The fact that a soldier cannot use a ticket purchased is not a loss of tangible personal property within the meaning of the Act, and such claims should be denied pursuant to paragraph 11–5d, AR 27–20 (10 July 1987).

As a part of the installation's claims education program, the fact that there is no legal authority to pay for airline tickets that cannot be used should be publicized to discourage soldiers from purchasing nonrefundable tickets. Mr. Frezza.

Missing Inventory Line Items and Obvious Damage at Delivery

Problems arise in adjudicating shipment claims involving missing line items and obvious damage which is not recorded by the claimant on the DD Form 1840, Joint Statement of Loss or Damage at Delivery. Claims offices have an obligation to inquire into the claimant's reasons for not recording this at delivery, even when the claimant notes the loss or damage on the DD1840R, Notice of Loss, within 70 days. If the claimant cannot provide an adequate explanation, payment for such items should be denied. In general, the longer the claimant waits to report missing inventory line items and obvious damage, the greater the claimant's burden to substantiate that the loss or damage occurred in shipment. Proof that a claimant owned a missing inventory line item, such as a purchase receipt, tends to bolster a claimant's explanation, but does not in itself substantiate that an item was lost in shipment.

Items missing out of cartons are not "missing inventory line items." Claimants are not normally expected to notice property missing out of cartons at delivery, and such items should be considered for payment to the extent that the claimant can substantiate ownership and value, unless the quantity and value of the items claimed as missing or other factors give reason to question the claimant's credibility. Mr. Frezza.

Management Notes

STANFINS

Army Finance and Accounting Offices (F&AO's) are beginning to use the new STANFINS Redesign, Subsystem 1 (SRD1), which allows electronic transmission of claims payment and check deposit data from the claims office to the finance office. Entry of this data eliminates virtually all paperwork associated with claims payment and check deposit, thereby saving time for both claims and finance personnel. STANFINS uses the ASIMS network, and requires the claims office to have a personal computer (or dumb terminal) with a communications board or card, a printer, a modem, a cluster controller, and a four-wire data circuit into the building. STANFINS training is provided by the local F&AO.

As an exception to paragraphs 2–32a and b, AR 27–20, claims offices at installations that have STANFINS installed are not required to send a voucher, claims forms and a certificate to the F&AO for payments made using STANFINS. CJA's must ensure that these documents are contained in the claims file prior to certifying payment, however, and are reminded that they are pecuniarily liable for improper payments. Personnel issued passwords will not disclose these to other persons, and will log out of the system after use.

Claims payment using STANFINS consists of two steps. One person logs in, enters payment data on one screen (note that the names of multiple payees can be listed on address lines), checks this data on a succeeding screen, and prints out a copy for the file using a screen print. At a later point in time, the CJA logs in and certifies payments entered. The F&AO will return vouchers, which are included in the claims files. The F&AO may be requested to configure STANFINS so that the name of the claims office is listed on the voucher, rather than the name of the F&AO.

Recovery checks will also be deposited using STANFINS, eliminating the need to complete DD Form 1131, Cash Collection Voucher. After check data is entered into the STANFINS system, a copy of the screen print-out is sent to the F&AO together with the checks. Carrier recovery checks will be entered separately from affirmative claims deposits. Case reimbursements from claimants may also be entered in this manner.

Claims offices at installations that do not have STANFINS installed should coordinate with their servicing F&AO's to ensure that they are included in any plans to install STANFINS. At installations which cannot provide the necessary equipment to link the claims office into the STANFINS system, coordination should be made with the OTJAG Information Management Office to obtain the necessary equipment. Mr. Frezza.

Forwarding Article 139 Files

Change 1 to AR 27–20 (10 July 1988) specifically tasks claims offices with monitoring the processing of article 139 claims at their installations and ensuring that copies are forwarded to USARCS in accordance with paragraph 9–8h of that regulation. This change is expected to be published by January 1, 1989.

Claims judge advocates are reminded to forward copies of article 139 claims using the cover sheet from the *Guidebook for Article 139 Claims* (figure 3–10) published as an appendix to the Claims Manual. Claims judge advocates should also ensure that the file contains some indication that the servicing finance and accounting office effected an assessment against the offender. Mr. Frezza.

Criminal Law Notes

Criminal Law Division, OTJAG

Reserve Components and Command Influence

Although the Reserve Jurisdiction Act focuses much attention upon individual Reserve component soldiers, the legislation has another significant effect. Reserve component commanders, senior officers, and noncommissioned officers will more frequently become directly involved in the court-martial process: commanders called upon to prefer and forward charges; senior officers called upon to make recommendations on disposition; and noncommissioned officers being asked to evaluate performance either to assist in the disposition determination or to assist a sentencing body. Essentially, the Reserve component chain of command will have a more active role in the administration of military justice.

Command influence is therefore a subject of timely interest to the Reserve components. Both Active and Reserve component judge advocates should include training on command influence in the curriculum of any Reserve component training. The recent wealth of case law provides abundant illustrations for instruction or discussion. Two recent articles also provide information upon which instruction can be based. *See* Gaydos & Warren, *What Commanders Need to Know About Unlawful Command Influence*, The Army Lawyer, Oct. 1986, at 9; Clementi, *Unlawful Command Influence: What Commanders Need to Know*, Military Review, Apr. 1988, at 66.

Kiddy Porn

Provisions of the Anti-Drug Abuse Act of 1988 include prohibitions against what is commonly referred to as "kiddy porn." Section 1460 of Title 18 was inserted to prohibit selling or possessing with the intent to sell not only obscene visual depictions, but also any visual depictions of "a minor engaging in or assisting another person to engage in sexually explicit conduct." "Depiction" excludes mere words, but includes undeveloped film and *videotape*. The terms "minor" and "sexually explicit conduct" have the same definitions given those terms in chapter 110 of Title 18. The prohibitions will have extraterritorial application. Judge advocates should be aware of these expanded anti-obscenity laws and be prepared to address their impact upon federal installations. One potential source of issues in this area is commercial videotape sales.

Elimination of Tower Amendment

Section 622 of the National Defense National Authorization Act for Fiscal Year 1989 closes the gap created by the "Tower Amendment." Retired service members who were reduced as a result of a court-martial when they were already retirement eligible will be paid based on the grade in which they actually retire and not the grade in which they would have been entitled to retire had it not been for the court-martial. Comptroller General Opinion B–225150 (4 May 1987) to the contrary is now moot. The effective date is October 1, 1988.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

RC Quotas for Resident Graduate Course

The Commandant, TJAGSA, has announced that two student quotas in the 38th Judge Advocate Officer Graduate Course (31 July 1989–18 May 1990) have been set aside for Reserve component JAG officers. The 42 week graduate-level course is taught at The Judge Advocate General's School in Charlottesville, Virginia. Successful graduates will be awarded the degree of Master of Laws (LL.M.) in Military Law. JAGC RC captains and majors with at least 5 years JAGC experience, as of 31 July 1989, are eligible to apply. Officers who have completed the Judge Advocate Officer Advanced Correspondence Course may apply for the resident course.

Each applicant must be nominated by his/her commander. The application packet must include the following:

Personal data: Full name (including preferred name if other than first name), grade, date of rank, age, address, telephone number (business and home).

Military experience: Chronological list of reserve and active duty assignments.

Awards and decorations: List of all awards and decorations.

Military and civilian education: Schools attended, degrees obtained, dates of completion, and any honors awarded. Law school transcript.

Civilian experience: Resume of legal experience.

Statement of purpose: In one or two paragraphs, state why you want to attend the resident graduate course.

Letter of Recommendation: USAR TPU: Military Law Center Commander or Staff Judge Advocate. ARNG: Staff Judge Advocate. USAR IMA: Staff Judge Advocate of proponent office.

DA Form 1058 (USAR) or NGB Form 64 (ARNG): These forms must be filled out and be included in the application packet.

Routing of application packets: Each packet shall be forwarded through appropriate channels to the Commandant, TJAGSA, ATTN: JAGS-GRA, Charlottesville, VA 22903-1781.

ARNG: Through the state chain of command and ARNG Operating Activity Center, ATTN: NGB-ARO-ME.

USAR CONUS TROOP PROGRAM UNIT (TPU): Through MUSARC chain of command, CONUSA SJA, and FORSCOM SJA.

USAR OCONUS TPU: Through MUSARC chain of command and MACOM SJA.

USAR CONTROL GROUP (IMA/REINFORCEMENT): Through Commander, ARPERCEN, ATTN: DARP-OPS-JA. All applications must reach TJAGSA NLT 15 February 1989. Those individuals selected to attend the course will be notified on or about 10 March 1989.

Notice of AY 89 On-Site Changes

Fifth Army's Contract Law functional area on-site, previously scheduled to be held in Kansas City on 11-12 March 1989, has been changed. It will now be held in Dallas from 19-21 May 1989. The POC is Major Dennis Carazza of the Fifth Army Staff Judge Advocate's Office. His phone number is AV 471-2208/4329 or commercial (512) 221 + extension.

The Columbia, South Carolina on-site has been rescheduled from 4-5 March 1989 to 11-12 March 1989. The location, subject matters, and action officer will remain the same. A session of the United States Court of Military Appeals will be held at the University of South Carolina Law School on Friday, 10 March 1989. Those individuals interested in attending the session should contact the on-site action officer, Major Edward Hamilton. His phone numbers are (803) 765-3227/749-1635.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated Quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1989

January 9-13: 1989 Government Contract Law Symposium (5F-F11).

January 17-March 24: 118th Basic Course (5-27-C20).

January 30-February 3: 97th Senior Officers Legal Orientation (5F-F1).

February 6-10: 22d Criminal Trial Advocacy Course (5F-F32).

February 13-17: 2d Program Managers' Attorneys Course (5F-F19).

February 27-March 10: 117th Contract Attorneys Course (5F-F10).

March 13-17: 41st Law of War Workshop (5F-F42).

March 13-17: 13th Admin Law for Military Installations Course (5F-F24).

March 27-31: 24th Legal Assistance Course (5F-F23).

April 3-7: 5th Judge Advocate & Military Operations Seminar (5F-F47).

April 3-7: 4th Advanced Acquisition Course (5F-F17).

April 11-14: JA Reserve Component Workshop.

April 17-21: 98th Senior Officers Legal Orientation (5F-F1).

April 24-28: 7th Federal Litigation Course (5F-F29).

May 1-12: 118th Contract Attorneys Course (5F-F10).

May 15-19: 35th Federal Labor Relations Course (5F-F22).

May 22-26: 2d Advanced Installation Contracting Course (5F-F18).

May 22-June 9: 32d Military Judge Course (5F-F33).

June 5-9: 99th Senior Officers Legal Orientation (5F-F1).

June 12-16: 19th Staff Judge Advocate Course (5F-F52).

June 12-16: 5th SJA Spouses' Course.

June 12-16: 28th Fiscal Law Course (5F-F12).

June 19-30: JATT Team Training.

June 19-30: JAOAC (Phase II).

July 10-14: U.S. Army Claims Service Training Seminar.

July 12-14: 20th Methods of Instruction Course.

July 17-19: Professional Recruiting Training Seminar.

July 17-21: 42d Law of War Workshop (5F-F42).

July 24-August 4: 119th Contract Attorneys Course (5F-F10).

July 24-September 27: 119th Basic Course (5-27-C20).

July 31-May 18, 1990: 38th Graduate Course (5-27-C22).

August 7-11: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

August 14-18: 13th Criminal Law New Developments Course, (5F-F35).

September 11-15: 7th Contract Claims, Litigation and Remedies Course (5F-F13).

3. Civilian Sponsored CLE Courses

March 1989

2: FB, Life Insurance in Tax and Estate Planning, Miami, FL.

2–3: PLI, Annual Institute on International Taxation, New York, NY.

2–3: ALIABA, Compensation—Liability for Damages from Land Use Controls, Los Angeles, CA.

2–3: GULC, Computer Law, Washington, DC.

2–3: GULC, EEO Law, Washington, DC.

2–3: PLI, Impact of Environmental Regulations on Business Transactions, San Francisco, CA.

2–3: ABA, International Litigation, New York, NY.

2–3: ALIABA, Patent Litigation, San Francisco, CA.

2–3: PLI, Product Liability of Drugs and Medical Devices, San Francisco, CA.

2–3: ABA, White Collar Crime, New Orleans, LA.

2–4: NELI, Employment Law Litigation, Jupiter Beach, FL.

3: FB, Criminal Law Update, Miami, FL.

3: NKU, Employment Law, Highland Heights, KY.

3: NCLE, Jury Instructions, Lincoln, NE.

5–11: FB, Practical Considerations in Handling Worker Comp Cases, Colorado, FL.

7–10: ESI, Competitive Proposals Contracting, Washington, DC.

9: FB, Negotiating Contracts for Professional Athletes, Miami, FL.

9: FB, The Legal Needs of Children, Tampa, FL.

9–10: GULC, Corporate Fraud, Washington, DC.

9–10: ABA, Employee Benefits in Bankruptcy, Washington, DC.

9–10: USCLE, Institute for Corporate Counsel, Los Angeles, CA.

9–10: PLI, Project Financing: Power Generation, Waste Recovery, Los Angeles, CA.

9–11: ALIABA, Lender Liability: Defense and prevention, Miami, FL.

10: FB, Mortgage Law, Tallahassee, FL.

10: FB, The Legal Needs of Children, Miami, FL.

10–11: UKCL, Legal Issues for Financial Institutions, Lexington, KY.

12–15: NCDA, Child Abuse and Exploitation, Colorado Springs, CO.

12–17: NJC, Evidence for Special Court Judges, Reno, NV.

12–24: NJC, Special Court—For Attorney Judges, Reno, NV.

12–24: NJC, Special Court—For Non-Attorney Judges, Reno, NV.

13–15: SLF, Short Course on Employment Discrimination, Dallas, TX.

16: FB, Computer Law, Tampa, FL.

16–17: NCLE, Estate Planning and Probate, Lincoln, NE.

17: FB, Bioethics and Informed Consent, Tampa, FL.

17: NKU, Civil Rights Section 1983 Actions, Highland Heights, KY.

18–24: PLI, 46th Annual Patent Bar Review, New York, NY.

18–25: NELI, Employment Law Briefing, Vail, CO.

19–22: NCDA, Prosecuting Drug Cases, Philadelphia, PA.

19–24: NJC, Special Series I: Advanced Contracts, Reno, NV.

20–24: FB, Trial Advocacy, Tampa, FL.

23: FB, Criminal Law Update, Tallahassee, FL.

23: FB, Evidence Review and Update, Miami, FL.

29–31: ALIABA, Pension, Profit-Sharing, and Other Deferred Compensation, San Francisco, CA.

30: FB, Negotiating Contracts for Professional Athletes, Sarasota, FL.

30–31: GULC, Tax-Exempt Organizations, San Francisco, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the August 1988 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the July 1988 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
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AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
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AD B116101	Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).
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AD B089092	All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
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Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B124193	Military Citation/JAGS–DD–88–1 (37 pgs).

Criminal Law

AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 95–1	Flight Regulations		15 Sep 88
AR 95–3	General Provisions Training, Standardization, and Resource Management		15 Sep 88
AR 190–14	Carrying of Firearms and Use of Force for Law Enforcement and Security Duties		23 Sep 88
AR 190–45	Law Enforcement Reporting		30 Sep 88
AR 380–67	Personnel Security Program		9 Sep 88
AR 600–85	Personnel—General Alcohol and Drug Abuse Prevention and Control	I02	2 Sep 88
AR 690–950	Career Management		8 Sep 88
CIR 608–88–1	Voting	1	19 Sep 88
PAM 25–9	List of Approved Recurring Management Information Requirements		1 Oct 88
PAM 25–36	Design and Production of Instructional Publications		30 Sep 88
PAM 25–30	Index of Army Publications and Blank Forms		Jun 88
PAM 25–37	Index of Graphic Training Aids (GTA)		23 Sep 88
PAM 25–51	The Army Privacy Program—System Notices and Exemption Rules		21 Sep 88
PAM 351–4	Army Formal Schools Catalog		15 Sep 88
PAM 570–101–1	Manpower Staffing Standards—Civilian Personnel		2 Sep 88

Cumulative Index

This edition contains a subject and author index of all articles appearing in The Army Lawyer *from November 1978 through December 1988. The index includes lead articles as well as USALSA and Claims Report articles. In addition, there are separate indexes for Policy Letters and Messages from The Judge Advocate General, Opinions of The Judge Advocate General, and Legal Assistance Items that appeared in* The Army Lawyer *from January 1988 through December 1988. References to* The Army Lawyer *are by month, year, and page.*

Subject Index

The Army Lawyer

November 1978—December 1988

CHILD SUPPORT

CHILDREN

CITA

CLAIMS

COPYRIGHTS, see also PATENTS

CORPS OF ENGINEERS

CORPUS DELICTI RULE

CORRECTIONS

CORRESPONDENCE

COUNSEL

COURT MEMBERS, see also COURTS-MARTIAL

COURT OF MILITARY APPEALS

COURT OF MILITARY REVIEW

COURT REPORTING

COURTS

COURTS-MARTIAL

CREDITOR-DEBTOR RIGHTS

CROSS-EXAMINATION

CUSTOM

-D-

DAMAGES

DATA RIGHTS

DEATH ON THE HIGH SEAS ACT

DEATH PENALTY

DEBTOR-CREDITOR RIGHTS

DEFENSE ACQUISITION REGULATION (DAR)

Admissibility of Polygraph Results Under the Military Rules of Evidence, by LCDR D.M. Williams, Jr., June 1980, at 1.

An Outline Approach to Defending Urinalysis Cases, by CPT Joseph J. Impallaria, Jr., May 1988, at 27.

Article 31, UCMJ and Compelled Handwriting and Voice Exemplars, by MAJ John R. Howell, Nov. 1982, at 1.

Bodily Evidence and Rule 312, M.R.E., by CPT David A. Schlueter, May 1980, at 35.

Child Abuse and Hearsay: Doing Away With the Unavailability Rule, by Jack W. Rickert, Nov. 1987, at 41.

Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome, The, by CPT Thomas J. Feeney, Sept. 1985, at 33.

Constitutional Parameters of Hearsay Evidence, The, by LTC James B. Thwing, Dec. 1986, at 24.

DNA "Fingerprint": A Guide to Admissibility, The, by CPT Robert R. Long, Jr., Oct. 1988, at 36.

Defending Against the "Paper Case", by CPT Preston Mitchell, Oct. 1988, at 31.

Defense Counsel Strategies for Dealing With a Client's Prior Conviction at Trial, by CPT George B. Thompson, Jr., Aug. 1986, at 66.

Defense Right to Psychiatric Assistance in Light of *Ake v. Oklahoma*, The, by MAJ Donald H. Dubia, Oct. 1987, at 15.

Discovery—Foundation for Due Process, by MAJ Larry R. Dean, May 1983, at 13.

Dunaway v. New York: Is There a Military Application?, by CPT Elizabeth W. Wallace, Oct. 1988, at 16.

Effective Use of Rape Trauma Syndrome, by CPT Michael S. Child, Oct. 1985, at 11.

Effective Use of Residual Hearsay, by CPT Michael S. Child, July 1985, at 24.

Everything You Always Wanted to Know About *Terry* Stops—But Thought It Was a Violation of the Fourth Amendment to Stop Someone and Ask, by MAJ Wayne E. Anderson, Feb. 1988, at 25.

Evidence of Rehabilitative Potential and Evidence in Aggravation: Misused and Abused, by CPT Lida A.S. Savonarola, June 1987, at 25.

Forensic Reports and the Business Exception, by CPT Alfred H. Novotne, Dec. 1986, at 37.

How Aggravating Can You Get? The Expanded Boundaries for Admission of Aggravation Evidence Under R.C.M. 1001(b)(4), by CPT Michael S. Child, Feb. 1986, at 29.

How Far is the Military Courtroom Door Closing for Defense Expert Psychiatric Witnesses?, by CPT Richard Anderson, Sept. 1987, at 31.

Impeachment by Contradiction, by LTC Charles H. Giuntini, Aug. 1987, at 37.

In Search of the Automobile, by MAJ Ernest F. Peluso, Jan. 1986, at 23.

Inevitable Discovery—Reprise, by CPT Stephen J. Kaczynski, Mar. 1983, at 21.

Inevitable Discovery: An Overview, by MAJ John E. Fennelly, Jan. 1988, at 11.

Innocent Man: The Accused Who Passes the Polygraph, An, by CPT Donna Chapin Maizel, June 1985, at 66.

Insanity on Appeal, by CPT Annamary Sullivan, Sept. 1987, at 40.

Introducing Documentary Evidence, by CPT Timothy A. Raezer, Aug. 1985, at 30.

Investigative Detentions for Purposes of Fingerprinting, by LTC David A. Schlueter, Oct. 1988, at 10.

Invoking the Right to Counsel: The *Edwards* Rule and the Military Courts, by MAJ Patrick Finnegan, Aug. 1985, at 1.

Jencks Act "Good-Faith" Exception: A Need for Limitation and Adherence, The, by CPT David C. Hoffman & Helen Lucaitis, Sept. 1986, at 30.

Judicial Notice in Urinalysis Cases, by MAJ Wayne E. Anderson, Sept. 1988, at 19.

Mental Evaluations of an Accused Under the Military Rules of Evidence: An Excellent Balance, by MAJ Vincent P. Yustas, May 1980, at 24.

Methodology for Analyzing Aggravation Evidence, A, by MAJ Larry A. Gaydos & MAJ Paul Capofari, July 1986, at 6.

Military Character: Relevant for All Seasons?, by LTC James B. Thwing, May 1988, at 39.

Military Rule of Evidence 304(g)—The Corroboration Rule, by LTC R. Wade Curtis, July 1987, at 35.

Military Rule of Evidence 404(b): An Important Weapon in the Trial Counsel's Arsenal, by MAJ James B. Thwing, Jan. 1985, at 46.

Military Rules of Evidence: An Advocate's Tool, The, by CPT Lee D. Schinasi, May 1980, at 3.

Military's Rape Shield Rule: An Emerging Roadmap, The, by LCDR Stephen Rose & MAJ Michael C. Chapman, Feb. 1984, at 29.

Mistake of Fact: A Defense to Rape, by CPT Donna L. Wilkins, Dec. 1987, at 24.

Nix v. Williams and the Inevitable Discovery Exception to the Exclusionary Rule, by CPT Stephen J. Kaczynski, Sept. 1984, at 1.

Novel Scientific Evidence's Admissibility at Courts-Martial, by 1LT Dwight H. Sullivan, Oct. 1986, at 24.

Of Good Faith and Good Law: *United States v. Leon* and the Military Justice System, by COL Francis A. Gilligan & CPT Stephen J. Kaczynski, Nov. 1984, at 1.

Practical Considerations of *United States v. Holt*: Use of the Accused's Answers During the Providence Inquiry as Substantive Evidence, by CPT James L. Pohl, Nov. 1988, at 20.

Previous Acquittals, Res Judicata, and Other Crimes Evidence Under Military Rule of Evidence 404(b), by MAJ Alan K. Hahn, May 1983, at 1.

Protecting the Child Witness: Avoiding Physical Confrontation With the Accused, by CPT David F. Abernathy, Nov 1985, at 23.

Salvaging the Unsalvable Search: The Doctrine of Inevitable Discovery, by CPT Stephen J. Kaczynski, Aug. 1982, at 1.

Scientific Evidence: Challenging Admissibility, by CPT Alfred H. Novotne, Oct. 1988, at 23.

Sentence Arguments: A View From the Bench, by MAJ Jody Russelburg, Mar. 1986, at 50.

Sentencing Evidence, by LTC Patrick P. Brown, Mar. 1988, at 29.

Standard of Proof of Motions for Findings of Not Guilty, The, by MAJ Frederic Carroll, May 1986, at 41.

Suppression Motions Under the Military Rules of Evidence, by MAJ Owen D. Basham, May 1980, at 17.

Uncharged Misconduct, by COL Francis A. Gilligan, Jan. 1985, at 1.

Uncharged Misconduct on Sentencing: An Update, by CPT Stephen W. Bross, Feb. 1986, at 34.

JUDICIAL NOTICE

JURISDICTION

-K-

KOREA

-L-

LAAWS

LABOR LAW

LABOR LAW, see also PERSONNEL, FEDERAL

LAMP

LAW OF WAR

LAW OFFICE MANAGEMENT

LAWYER REFERRAL

LEGAL ASSISTANCE

MISCONDUCT

MISREPRESENTATION

MOTIONS

MULTIPLICITY

PERSONNEL, OFFICER

PLEAS

POLYGRAPH

POSSE COMITATUS ACT

POST-TRAUMATIC STRESS DISORDER

POST-TRIAL

PRETRIAL AGREEMENTS

PRETRIAL CONFINEMENT, see also PRETRIAL RESTRAINT

PRETRIAL PREPARATION

SECURITY

SECURITY CLEARANCE

SELF-ADVOCACY

SELF-INCRIMINATION

SENTENCING

SEPARATIONS, see also ADMINISTRATIVE BOARDS

SERVICE OF PROCESS

SETTLEMENTS

SIXTH AMENDMENT, see also COUNSEL

SKILL QUALIFICATION TEST (SQT)

SOCIAL SECURITY

SOLDIERS' & SAILORS' RELIEF ACT

SOLICITATIONS

SPEECHES

SPEEDY TRIAL

SPOUSE ABUSE

STAFF JUDGE ADVOCATE

Author Index

The Army Lawyer

November 1978—December 1988

—C—

-F-

–I–

–J–

-O-

-P-

-T-

Index of Legal Assistance Items

The Army Lawyer

January 1988—December 1988

ESTATE PLANNING

FAMILY LAW

MISCELLANEOUS

TAX

Index of Policy Letters and Messages from The Judge Advocate General

The Army Lawyer

January 1988—December 1988

Index of The Judge Advocate General's Opinions

The Army Lawyer

January 1988—December 1988

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